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FOREWORD TO THE SECOND ISSUE

When putting together this second issue of the J.C.C.L., we did not intend there to be a theme. However, thanks in large part to some of the most important output of the highest courts across the Commonwealth, many case notes and articles in this issue can be said to fall under one broad theme: state misconduct in the investigation and prosecution of crime, and what to do about it.

This is true of Scott Optican's article, on the exclusion of improperly obtained evidence in New Zealand as a possible model for a change in the exclusionary rule in the United States. It is especially true of the case notes on the trio of Commonwealth abuse cases (at p.333, *post*); on *Hamed* (New Zealand) and *Côté* (Canada) (at p.345, *post*); and on extradition in long-delayed cases in Belize and Fiji (at p.322, *post*). Issues as to the exclusion of evidence – which inevitably arise in such cases – are also dealt with in the case note on *Stubley* (Australia), concerning propensity evidence, and the importance of identifying what it is admitted to prove.

The other striking aspect of this issue is that we have managed to bring together a number of articles that are highly relevant to practitioners. This is especially important to me, because I believe that it is in the cross-pollination of academic work and practice that we can achieve the best arguments in court, judgments, and research. Indeed, I bemoan the stark delineation that is sometimes seen between "pie in the sky" academic texts, and judgments lacking in intellectual rigour. This journal does not pretend to resolve this problem – but let us hope it helps bridge the gap.

In this class, I put all three other articles. Peter Lowe's, on challenges for the jury system and a fair trial in the twenty-first century (at p.175, *post*), is a topical and erudite exposition of the various kinds of problems that arise with – or are exacerbated by – the rise of "social media" and the ubiquity of the internet in the palm of your hand. David Caruso's, mooting three proposals for the reform of the cross-examination of child witnesses (at p.254, *post*), is well thought out, and radical. The problems he highlights chime with the experience of colleagues at the bar, of some highly inappropriate handling of child witnesses; his innovative solutions might commend themselves to our lawmakers. Kessler Soh's article on the criminal case management system in Singapore (at p.209, *post*) is a clear and concise exposition of a system that is finding favour in various common law jurisdictions. The case note on consent in advance to sexual activity when unconscious addresses a key Canadian decision, which may well influence judges in other jurisdictions, faced with similar complaints. And, of course, the

excellent jurisdiction spotlight, on Canada – for which we have the Hon. Justice David Paciocco, one of our editorial board, to thank – gives an excellent overview of general trends in Canadian legislation and jurisprudence. Some of these will no doubt be familiar to practitioners across common law jurisdictions – not least in New Zealand, where the *Criminal Procedure (Reform and Modernisation) Bill* in its original form, on which I wrote in the last issue, ran the risk of reversing the burden of proof on defences. By the time of its eventual enactment late this year, many of the highly controversial provisions had been dropped.

Finally, this issue is "bang up to date," with case notes on the U.K. Supreme Court's decision in *Gnango*, delivered five days before we go to press (at p.299, *post*), and the recent spate of Scottish appeals in respect of self-incrimination and the right to legal advice (at p.357, *post*).

I am grateful to the Editorial Board for their work and counsel. Their combined experience is invaluable, and incomparable. Special thanks are also due to Atli Stannard, who has not only contributed two of the case notes, but has also master-minded the whole process, from commissioning articles, through arranging for peer-review, to subediting the entire content.

J.R.
December 18, 2011

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CHALLENGES FOR THE JURY SYSTEM AND A FAIR TRIAL IN THE TWENTY-FIRST CENTURY

*PETER LOWE**

ABSTRACT

This article explores current problems facing the common law jury. External and internal influences and pressures are challenging the institutional integrity of the jury. The issues canvassed include juror misconduct, the carrying out of unauthorised research, the challenges of social media, intimidation within the jury room, the complexity of criminal laws, and calls for juries to deliver reasons for their verdict. The question is asked whether these difficulties presage the end of the jury as we know it. Proposals for reform are discussed to address these challenges.

I. INTRODUCTION

There are two cherished ideals celebrated in common law jurisdictions. The first is that it is better that the guilty go unpunished than condemn the innocent.[1] The second is that trial by jury is sacrosanct. The two ideals are intertwined and, to a degree, it is the latter which is the final and indispensable arbiter of the former.[2]

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* B.A., LL.B. (Sydney); Barrister (New South Wales, Victoria, Queensland, Australian Capital Territory). The author would like to acknowledge the invaluable contribution of Atli Stannard in the preparation of this article.

1 Justinian I, *Corpus Iuris Civilis* (Mommsen *et al.* eds, var. edns), *Dig.*48.19.5pr (Ulpianus). William Blackstone's precept that it is "[better] that ten guilty persons escape than one innocent suffer" (see Wayne Morrison (ed.) *Blackstone's Commentaries on the Laws of England* (Cavendish 2001), Book IV, Ch.27, 359) is a continuation of that same line of authority. The ratio 10:1 has become known as the 'Blackstone ratio': see A. Volokh, "*n* Guilty Men" (1997) 146 University of Pennsylvania Law Review 173, 174. Sir Matthew Hale was more circumspect when he stated that it was "better five guilty persons should escape unpunished than one innocent person should die": Matthew Hale, *Historia placitorum coronæ* [The History of the Pleas of the Crown] (vol. 2., George Wilson ed., T. Payne 1778), 289. Charles Dickens was more generous with his largesse in referring to capital cases when he stated "that hundreds of guilty persons should escape" (quoted in Volokh, *ibid.*, 188, fn.102). On the significance of the Blackstone ratio for the Australian criminal justice system, see *R. v. Carroll* (2002) 213 C.L.R. 635, [21].

2 Whilst a jury verdict of not guilty does not establish innocence it does however establish that guilt has not been proven beyond reasonable doubt to the satisfaction of the jury. An extreme manifestation of the power of a jury to return a verdict of not guilty notwithstanding evidence to the contrary, even overwhelming evidence, is

This article argues that the institutional integrity of the jury system in common law jurisdictions is under severe threat. In the past, the nature of the challenge was primarily external: jury packing, jury vetting, qualifications for jury duty, compilation of jury lists – the list goes on. Sadly today the challenges are more commonly, but not exclusively, of an internal nature: technology, the complexity of the task and comprehension, the quest for the reasoned verdict. The question must be asked, do these challenges – both external and internal – presage the end of the jury system as we know it?

II. THE HISTORY OF THE JURY TRIAL – A CASE OF EXTERNAL PROBLEMS

Although trial by jury has long existed, some of its historical precedents would be unrecognisable to the modern lawyer. We have much to learn from the extraordinary history of trial by jury, and it is by understanding this heritage that the future of trial by jury can be protected.

Until fairly recent times, many of the problems which affected juror deliberations were of external origin. Jury lists were prepared which excluded significant segments of society, including all women. External influences, such as jury packing, bribery, and embracery impacted on the deliberation process of the jury. Speaking with, or providing sustenance to, any juror who was deliberating was prohibited because of the perceived need to protect jurors from any attempt to influence their ultimate decision. One significant external factor was presiding judicial officers who sought to control the jury by means of their authority of office.

September 2020 will see the 350th anniversary of the case cited as the basis of the modern jury, in which a jury refused to convict William Penn and William Mead for unlawful assembly following a one-sided summing-up in favour of the Crown. After several "not guilty" verdicts, the judge ordered the jury to be imprisoned "without meat, drink, fire or tobacco" and, when the jury still insisted on returning a "not guilty" verdict, the judge fined them forty marks.[3]

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provided by *jury nullification* which enables a jury to ameliorate the impact of laws perceived to be unfair or discriminatory in their application: see text at n.3 *et seq*.

[3] During a fractious courtroom debate, William Penn uttered the immortal words: "If Not Guilty be not a verdict, then you make of the Jury and Magna Charta but a mere nose of wax", *Cobbett's Complete Collection of State Trials*, vol. 6 (1810), 964. The reference to a nose of wax refers to a thing easily turned or moulded in any way desired; a person easily influenced, one of a weak character. The term was apparently in common use until about 1700 to describe attempts to "reinterpret" Biblical passages to suit one's convenience, see H.C. Porter "The Nose of Wax: Scripture and the Spirit from Erasmus to Milton" (1964) Transactions of the Royal Historical Society (Fifth Series), 155-174.

Four jurors, including Edward Bushel, refused to pay and spent several months in prison. By writ of *habeas corpus* to the Court of Common Pleas, Edward Bushel in effect challenged the legality of his detention. The sheriffs of London on their return to the writ alleged that Bushel and other jurors acquitted Penn and Mead "against plain and manifest evidence contrary to the direction of the Court in a matter of law… in contempt of the Lord King and his laws, and to the great impediment and obstruction of Justice, and moreover to the bad example of other jurors delinquent in like case[s]".[4] Vaughan C.J. in *Bushel's Case* held that a juror could not be fined or committed to prison for non-payment of those fines for returning a verdict contrary to the directions of the trial judge.[5]

Nearly two hundred years later, during the rule of Queen Victoria, the jury had come to be seen as a defining feature of British good government and fair play, and as an example for other nations. This sentiment is forever captured in John Morgan's 1861 painting of a particular jury empanelled at the Assizes at Aylesbury. Much is on display in that famous painting.[6] The jury is all male, and reflects the restrictive age, property and financial qualifications necessary to be on the jury roll.[7] What we do know is who each of those jurors is, precisely because their status in the local community was well known, as were their names when read out on empanelment. It was because of this that there developed the practice of challenges for cause and to the array.[8] From a plaque attached to John Morgan's painting we know the names and occupations of the jurors. Apparently, lawyers were held in much higher regard then than they are today, as there are

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4 John H. Langbein, "The Criminal Trial Before the Lawyers" (1978) 45 University of Chicago Law Review 263 at footnote 105, 298, referring to *Bushel's Case*, 124 E.R. 1006, 1 Vaugh. 135, 136. The translation from Latin is Langbein's.

5 Langbein, *ibid.* He suggests that *Bushel's Case* (also referred to as *Bushell's Case*) did not become a significant landmark case until about a century after it was decided.

6 John Morgan, *The Jury* (oil on canvas) 1861, Buckinghamshire County Museum, Aylesbury <http://www.buckscc.gov.uk/bcc/museum/ea_The_Jury.page>, accessed August 1, 2011.

7 By the *Juries Act* 1825, in order to be qualified to serve, the juror was required to possess an annual income derived from real estate, be a householder of rateable property or, curiously enough, be an occupant of a house containing not less than fifteen windows: H. Cary, *A Practical Treatise of the Law of Juries and Jurors* (J. & W.T. Clarke 1826) <http://goo.gl/w0KwH>, accessed August 1, 2011.

8 In Australia, challenges for cause are exceedingly rare in their invocation and, even more so, rarely granted. However, generally speaking, the availability of peremptory challenge mitigates the need for such a challenge. In England and Wales, challenges for cause are mounted where racialised accused are involved. In Canada, challenge for cause is provided for under the *Criminal Code* 1985, as amended (s.638), and may be invoked where the racial prejudice of potential jurors impacts on their impartiality and the overall fairness of the trial; see *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Williams* [1998] 1 S.C.R. 1128, (1998) 124 C.C.C. (3d) 481; *R. v. Parks* (1993) 84 C.C.C. (3d) 353.

three lawyers on that jury.[9] It was also common for such jurors to follow publicity generated by the trial they were on. We know this from the *Tichborne Claimant* case in 1871, when the jurors read the scandalous broadsheets about the case.[10] That is precisely the vice that is so keenly guarded against today.

The prohibition on jurors relying on extraneous experience or knowledge, independent of the evidence adduced in a criminal trial, is recent. From the twelfth to the sixteenth centuries, it was incumbent on jurors to know in advance, or discover, the facts or events in dispute, and they would ordinarily decide without the help of any documentary or testimonial evidence given in court. Legal historians commonly refer to the "self-informing jury".[11] Jurors had the formal character of witnesses down through the sixteenth century. In this respect, whilst parties related to the litigants (including counsel) could speak to the jurors to inform them of relevant matters, the same rule did not apply to strangers to the proceedings who could not speak to the jurors, even if they had knowledge of the events. This was viewed as a form of embracery.[12] This effectively barred witnesses not related to the parties who volunteered their evidence.[13] It was thus said of these types of juries that they came to court more to speak than to listen.[14]

An example of how such a self-informing jury actually worked is given by the distinguished legal scholar, Professor Oldham. In 1380, the coroner and sheriffs of London summoned a jury from Langbourne ward and its three adjacent wards and, after having them view the body of the victim, inquired of the jurors "how and in what way he came to his death". The jurors said that they were "at the moment completely ignorant" of who the malefactors were or how the slaying had been committed. The case was put over to the following week to give the jurors time to inquire more fully, but by the following Monday the jurors had discovered nothing more, so they were ordered to come again approximately a month later. When they returned as ordered, they recounted the details of a quarrel and identified and indicted the accused murderers.[15]

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[9] In most common law jurisdictions lawyers are not precluded from serving on juries. However, as a matter of practicality, it is rare for a lawyer to serve on a jury, particularly in those jurisdictions where right to peremptory challenge exists.

[10] Roland Quinault, "Victorian Juries" *History Today* (May 2009), 47-53.

[11] James Oldham, *The Varied Life of the Self-Informing Jury* (Selden Society 2005).

[12] David J. Seipp, "Jurors, Evidences and the Tempest of 1499", in John W. Cairns and Grant McLeod (eds) *The Dearest Birth Right of the People of England: The Jury in The History of the Common Law* (Hart 2002), 84.

[13] *ibid.*, p 83.

[14] See Langbein (n.4), 299.

[15] See Oldham, *The Self-Informing Jury* (n.11), 21.

In addition to the self-informing jury, during the seventeenth century the common law also saw the development of the "special" jury. Customarily, these special juries were comprised of merchants with knowledge of commercial customs and practice, and experience of English commercial law. Special juries were recognized in 1730 by declaratory statute as having been in existence prior to that date.[16] A special roll of 48 qualified jurors was drawn up by the sheriff which was reduced to 24 by each of the parties taking turns to strike out names (hence special juries are also known as "struck juries"). Such special juries constituted a jury of experts who were permitted, perhaps encouraged, to participate in the trial and to articulate, where relevant, mercantile practices.[17] But special juries were not restricted in their operation to mercantile issues and could be ordered in all common law courts for civil or criminal law matters other than for treason or felony.[18] Sedition trials, being for misdemeanour, were usually tried by special juries.[19] There was no right of peremptory challenge at the trial as the right of striking such a jury was regarded as an analogous right.[20]

Another species of the self-informing jury was the *jury of matrons*. At common law a female could not take part in the administration of justice either as judge or juror, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy.[21] For at least seven centuries women served on exclusively female special-purpose juries. They were empanelled for both civil matters (usually where a question arose as to inheritance of a husband's estate) and criminal matters (where a stay of execution pending birth would be granted and then converted to transportation for life). To provoke the inquiry, the female party to the litigation would, in the language of the day, "plead her belly".[22]

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16 *An Act for the Better Regulation of Juries* 1730; see James B. Thayer, "The Jury and its Development" (1891-1892) 5 Harvard Law Review 300, 301-302.

17 On the history and development of special juries, see James Oldham, "Origins of the Special Jury" (1983) 50 University of Chicago Law Review 137, also "Special Juries in England: Nineteenth Century Usage and Reform" (1987) 8 Journal of Legal History 148, and Oldham, *The Self-Informing Jury* (n.11), 24-31.

18 R. M. Jackson, "Jury Trial To-Day" (1936-1938) 6 Cambridge Law Journal 367, 369

19 *ibid.,* 369. Jackson notes that the qualifications necessary to be a special juror were always rather vague.

20 Jeannette E. Thatcher, "Why not use the Special Jury" (1946-1947) 31 Minnesota Law Review 232, 238.

21 See *Blackstone's Commentaries* (n.1), Book III, Ch.23, 362. See also *Edwards v. Att.-Gen. for Canada* [1930] 1 A.C. 124, 128-129.

22 James Oldham, "On Pleading the Belly: A History of the Jury of Matrons" (1985) 6 Criminal Justice History 1; Oldham, *The Self-Informing Jury,* (n.11), 31-43. In *R. v. Wycherley* (1837) 8 Car.&P. 262; 173 E.R. 486, a jury of matrons was empanelled and the following oath was sworn – "You, as forematron of this jury, swear that you will diligently inquire, search, and try … the prisoner at the bar, whether she be quick

There was a memorable instance, fairly early after settlement, of a jury of matrons in Australia. In 1788 Ann Davis was charged before a Judge-Advocate sitting as the Court of Criminal Jurisdiction that she did "break and enter a dwelling house in Sydney Cove and therein did feloniously steal some clothing items". The military jury returned a verdict of guilty, whereupon the prisoner declared that she was pregnant. A jury of matrons was immediately empanelled and examined the prisoner. On the return of the jury, the forewoman, apparently a grave personage between sixty and seventy years old, declared to the court, "Gentlemen, she is as much with a child as I am". The Judge Advocate, David Collins, passed sentence and the prisoner was executed.[23] She was the first woman put to death in Australia.

Before leaving the issue of gender, it would appear that in England, between 1919 (when women became qualified to be selected for jury service) and 1972, the trial judge had the power to order that the jury be wholly comprised of members of one sex. In 1969, Thesiger J. exercised his power to secure the empanelment of an all-female jury which the trial judge thought appropriate for the trial of a woman charged with the manslaughter of her niece. The Court of Appeal expressed disapproval and the power of empanelling based exclusively on gender was subsequently abolished.[24]

In England until 1870, foreigners and members of minorities had the right to be tried by a jury comprised half of foreigners, though not necessarily of the same race. The asserted right, which was recognized as far back as the sixteenth century, was to have representatives of one's own community on the jury.[25] It was called the jury *de medietate linguae* ("half tongue").[26]

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with child or not, and thereof a true verdict give, according to the best of your skill and knowledge. So help your God." Quick with child means having conceived.

[23] *R. v. Davis* [1789] N.S.W.K.R. 5; [1788] NSWSupC 5, in Bruce Kercher, Brent Salter (eds.) *The Kercher Reports: Decisions of the New South Wales Superior Courts, 1788 to 1827* (Francis Forbes Society for Australian Legal History 2009), 53 *et seq*. See also Gregory D. Woods, *A History of criminal law in New South Wales: the colonial period, 1788-1900* (Federation Press 2002), 24, referring to John F. Nagle, *Collins, The Courts of the Colony: Law and Society in Colonial New South Wales 1788-1796* (University of New South Wales Press 1996), 157; Ian Barker, *Sorely tried: Democracy and trial by jury in New South Wales* (DreamWeaver Publishing 2003), 222.

[24] A. Sealy and W. R. Cornish, "Jurors and their Verdicts" (1973) 36 Modern Law Review 496, 499, fn.9. It is still possible in South Australia to have an issue decided by an all male or all female jury where the court so decides, either on application of the parties or on its own volition, see *Juries Act* 1927 (S.A.), s.60A.

[25] See Langbein (n.4), 152.

[26] See Penny Darbyshire, Andy Maughan, Angus Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Occasional Paper Series 49, Kingston Law School, February 2002), 15 <http://eprints.kingston.ac.uk/23/1/Darbyshire-P-23.pdf> accessed November 3, 2011 . There, the authors state that

From this brief review of the jury at common law, it is evident that the jury was seen as something to be experimented with, a reflection of changed societal circumstances, and whose members were encouraged to use their skills and experience in a manner unheard of today. But the notion of an independent jury, not sullied by extraneous, prejudicial or irrelevant material developed slowly, over time – and ultimately gave rise to the modern jury. The challenges to the jury system are manifold. The question must be asked, how is the jury to survive the twenty-first century?[27]

III. PROBLEMS FACED BY THE MODERN JURY, AND SOME POSSIBLE SOLUTIONS

The essential feature of the modern common law jury is the institutional integrity and independence of its decision-making processes. Crucially, a jury are not told about issues such as the character of an accused which, if discovered or disclosed, could well affect the outcome of their deliberations. Protection of the jury from receipt of any information regarding the accused has now become a rod for their own back. Information about trial matters is freely available and impossible to control, even with the delivery of extensive warnings by the trial judge. The problems that jurors face today are thus very different from the past: juror misconduct, accessibility to information, complexity of criminal laws illustrate that the challenge to the jury process is chiefly of an internal nature. The problems emanate from within the jury – constituted by a failure of comprehension or to follow warnings. So significant have these problems become that it is necessary to consider a variety of proposals for reform in order to preserve the jury for future generations: taping of jury deliberations, the introduction of jury facilitators, reduction and simplification of judicial directions, reconsideration of the utility of sequestration, amongst other reforms, need to be considered.

A. Juror misconduct

Juror misconduct has been around for as long as there have been common law juries. Indeed, a review of the Year Books and

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the right was abolished in 1870 on the ground that "no foreigner need fear for a fair trial in England".

[27] The answer to that question can be readily given in the Australian context in respect of Federal matters as s.80 of the *Commonwealth Constitution* requires trial by jury for indictable offences. This requirement can be circumvented by the Commonwealth declaring that matters be tried summarily rather than on indictment. How far the Commonwealth would use this power in the future to avoid trial by jury is anyone's guess.

Abridgments for the fourteenth and fifteenth centuries reveals about one hundred cases which deal with juror misconduct, involving allegations of bribery, embracery, runaway jurors, and drinking and eating during deliberations.[28] Nowadays, juror misconduct typically involves one or more of the following:

a) an unauthorised visit to the scene;
b) consultation of outside substantive information;
c) communication with non-jurors;
d) physical intimidation or coercion by other jurors;[29] and-
e) bribery and improper suasion of jurors.

Part of the problem of juror misconduct must be suspected to be the enduring pull of popular culture, particularly such films as *12 Angry Men*. In Australian jury research, jurors consistently tend to compare their own experiences with that film.[30] Many other films and television programmes may well form part of the constitutive experience of the juror, but *12 Angry Men* provides a foil as to how a juror might approach his or her task as a prospective juror.

The movie is notable for how a lone juror (juror number eight, played by Henry Fonda) stands alone when he enters the jury room, saying that he has a reasonable doubt, and eventually sways the rest of the jury, by reasoned argument, to the same conclusion.

For example, Juror number eight's doubts are reinforced by the fact that the murder weapon is not as unique as the prosecution would contend. He buys an identical knife from a pawn shop near the scene of the crime. He brings it into the jury room and jams it into the table. His driving the knife into the table is a turning point in the jury's deliberations, unleashing other jurors' hitherto undisclosed doubts.

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[28] See Seipp (n.12), 75; the author makes the point that "food and justice seemed locked in an eternal struggle", for when jurors deliberated, no food or water was given to them, ostensibly so as to prevent anyone speaking to them, and, by virtue of extreme discomfort, to make the jurors reach a quick verdict, with the same jury deciding several trials in the one day: *ibid.*, 86-89.

[29] In the United States the categories of juror misconduct include these here identified, as well as the two additional problems of missing or additional jurors, and untruthful jurors. This last category arises from the practice of holding *voir dire* hearings – which term, in the U.S., refers exclusively to the process of asking jurors questions for the process of empanelment. See L.A. Caldwell & K.A. Wilkins, "The Jailed Juror and Other Tales of Juror Misconduct: Is Reform Required in Illinois?" (2001) 21 Northern Illinois University Law Review 379.

[30] See New South Wales Law Reform Commission (NSWLRC), *Majority Verdicts*, (NSWLRC R111, 2005), para.4.29.

Juror number eight does what the defence lawyer failed to do: he tests the prosecution case to see whether there is any room for reasonable doubt.[31] It is in this that the allure of the movie resides.[32]

Conversely, the movie has legitimately attracted criticism for its depiction of serious juror misconduct.[33] Charles Weisselberg has identified the following juror irregularities:

a) conducting an unauthorised visit to the accused's neighbourhood;
b) the giving of unsworn, hence untested, evidence in the jury room regarding an identical knife that was purchased near the home of the accused;
c) juror number five (played by Jack Klugman) giving expert evidence as to the use of a switchblade knife;
d) speculative calculations regarding train speed and noise; and
e) conducting an experiment, not based on any evidence adduced at trial, as to whether a witness could reach a door within 15 seconds.

In fact the nature of the speculative activity of the jury in the movie drove United States Supreme Court Associate Justice Sotomayor, when sitting as a lower-court judge, to refer to the movie in instructing jurors how *not* to carry out their duties.[34]

1. Unauthorised visits to scene

In Australia, an extra-curial investigation by the jury in the trial of Bilal and Mohammed Skaf for aggravated sexual intercourse without consent proved pivotal in forcing judicial change regarding directions given to juries on carrying out such investigations.[35] The foreman of the jury went with another juror to ascertain the prevailing conditions under which the complainant was able to identify the accused. The misconduct led the New South Wales Court of Criminal Appeal to quash the conviction on the basis that the jury's verdict was tainted

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[31] Juror number eight memorably says, at one point, "It is also possible for a lawyer to be plain stupid, isn't it?". That conundrum is never answered, for the defence lawyer never appears or says anything during the movie. Likewise, the return of the verdict is also not shown.

[32] Despite the misconduct, one commentator said that there are "too few Henry Fondas in modern jury pools", see Morris B. Hoffman, "The Myth of Factual Innocence" (2007) 82 Chicago-Kent Law Review 663, 664.

[33] Charles D. Weisselberg, "Good Film, Bad Jury" (2007) 82 Chicago-Kent Law Review 721, 726.

[34] Kirk Semple "The Movie that Made a Supreme Court Justice", *New York Times* (New York, October 17, 2010), A23 <http://www.nytimes.com/2010/10/18/nyregion/18sonia.html?ref=nyregion>, accessed August 4, 2011.

[35] Judicial Commission of New South Wales, *Criminal Trials Court Bench Book,* Direction 1-520, <http://www.judcom.nsw.gov.au/publications/benchbks/criminal> accessed November 1, 2011.

by misconduct.[36] The foreman of the jury told the court, "I only went to the park to clarify something for my own mind. I felt I had a duty to the court to be right".[37] Whilst the judicial direction now given is admirable for its clarity on the issue, jurors still seek to circumvent the direction. This was exemplified in the recent discharge of a New South Wales jury in a high-profile murder case where the Crown contended that the victim was forcibly thrown head first off a cliff. A jury member called a radio station to complain that a fellow juror was a bully and had already made her mind up, and that the jurors were planning to visit the cliff site. The jurors were questioned by the trial judge the next day, and his Honour concluded that the caller was a member of the jury and that one or more jurors had misconducted themselves. He discharged the jury.[38]

2. Juror research – the challenge of technology

The last three decades have proved to be a watershed in the development of technology and the challenges it poses to the institutional integrity of the jury. Since the 1980's they have witnessed the first commercially available mobile phone (1983), SMS text messaging (1989), Google (1996), the first mobile phone with wireless email and internet (1996), and the launch of Wikipedia (2001), Facebook (2004), YouTube (2005) and Twitter (2006). There are yet more microblogging and social network sites providing an unknown and unknowable opportunity to affect the functionality of the jury.

It is a truism that social networking, the World Wide Web, and smart phones have altered our daily lives, and they now have the potential to alter the way that jurors decide cases. As one insightful writer on this issue has said the new technology is transforming the "jury box into Pandora's box".[39] There are now some in society who do not really know how to survive without information technology – and to tell anyone from the millennial generation not to retrieve information available at their fingertips is a red rag to a bull.

Professor Cheryl Thomas was recently commissioned by the United Kingdom Ministry of Justice to undertake an empirical study

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36 *R. v. Skaf* [2004] NSWCCA 37, (2004) 60 N.S.W.L.R. 86.

37 *ibid.*, [204].

38 Emma Renwick, "Lateline", *Australian Broadcasting Corporation, ABC1* (August 6, 2008) <http://www.abc.net.au/lateline/content/2008/s2326389.htm>, accessed November 1, 2011.

39 John G. Browning, "The Online Juror" (May-June 2010), 93 *Judicature* 231, 234; also "When All That Twitters Is Not Told: Dangers Of The Online Juror (Part 3)", (August 2009) 3 *Litigation Commentary &* Review 8 <http://www.trialcounsel.org/082909/BROWNING.htm>, accessed November 1, 2011.

of the fairness of juries *vis à vis* jurors' internet usage.[40] This was probably the largest study done so far on jurors' use of the internet. The study showed that in standard cases five per cent of all jurors looked for information about the case they were presiding over whilst the case was going on. Over twice as many jurors serving on high profile cases (12 per cent) admitted to doing so. The figures are proportionally higher in relation to seeking media reports regarding the trial, with 13 per cent doing so in standard cases and 26 per cent in high profile cases.[41] Surprisingly, the great majority of jurors looking for information about their case (68 per cent) were aged 30 years or older.[42]

Australia is not immune from such impropriety. In June 2011, following the announcement that the jury in a high profile Victorian murder trial were deadlocked, court officials discovered that a jury member had gone online to "google" a legal term and download information from an online encyclopedia. The juror was released without a conviction being recorded, but on a 12-month good behaviour bond and with a $1,200 fine.[43] There have been more reported instances of the same type of conduct elsewhere in Australia.[44]

Social networking sites have been accessed by jurors to seek background information about offenders and victims. In one sexual abuse trial in the United States, jurors looked up the MySpace profile of two victims who gave evidence.[45] So much for the careful safeguards on introducing character evidence against victims in sexual offences trials.

It should also be said that there is no guarantee that the information retrieved by an aberrant juror has not been put online by the accused him- or herself, or through an agent. Such information has as much potential to affect the deliberations of the jury as information retrieved from Wikipedia or any other apparently

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40 Cheryl Thomas, *Are juries fair?* (Ministry of Justice Research Series 1/10, February 2010) <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf> accessed November 1, 2011.

41 *ibid.*, 43.

42 *ibid.*

43 Jon Kaila, "Juror in hot water for online search", *Herald Sun* (Melbourne, June 19, 2011), <http://www.heraldsun.com.au/news/more-news/juror-in-hot-water-for-online-search/story-fn7x8me2-1226077656291> accessed November 1, 2011.

44 *R. v. Folbigg* [2007] NSWCCA 371 (information from the internet regarding the retention of body heat in a deceased baby), *R. v. K.* [2003] NSWCCA 406, (2003) 59 N.S.W.L.R. 431 (material acquired from an unreliable internet source).

45 Declan McCullagh, "Police Blotter: MySpace Profile Sets Convicted Felon Free", *CNET News* (West Virginia, November 30, 2007) <http://news.cnet.com/Police-Blotter-MySpace-profile-sets-convicted-felon-free/2100-1030_3-6220818.html> accessed November 1, 2011.

objective source, precisely because of the free access to the internet, and the lack of peer review of such information. Providing the website is ranked sufficiently high on Google's search engine, it will be found fairly easily – usually within the first page or so of the search results. A similar point was made in November, 2010, by Lord Judge, the Lord Chief Justice of England and Wales, that Twitter could be used by campaigners in a bid to influence the outcome of a trial.[46] His warning, given before the misconduct of a juror named Joanne Fraill (as to which, see *post*), that it may be necessary to deal with an aberrant juror for contempt and treat the misconduct with the "seriousness that it requires" was remarkably prescient, and Lord Judge was later responsible for imposing an eight-month sentence of imprisonment on Ms Fraill.[47]

For his Lordship:

> "the misuse of the internet represents a threat to the jury system, which depends, and rightly depends, on evidence provided in court which the defendant can hear and if necessary challenge. He is not to be convicted on the basis of material which from his point of view is secret material – not only secret material, which is bad enough, but material which may be inaccurate and could also be false."[48]

The issue of digital injustice has the potential to derail the very basis upon which justice is administered and must, on that score alone, be addressed if the notion of a fair trial according to law is to be preserved.

3. Improper contact and the challenge of social media: When all that twitters is not told

Technology not only provides unprecedented opportunities for juror research; it appears that, precisely because of its anonymity and immediacy, the siren song of the web encourages transgressions through the phenomenon of "disinhibition", leading to impulsive behaviour.[49]

In November, 2008, a female juror serving on a Lancashire child abduction and sexual assault trial posted that "I don't know which way to go, so I'm holding a poll". As she didn't use any privacy

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[46] Lord Judge, Lord Chief Justice of England and Wales, "Jury Trials" (Judicial Studies Board Lecture, Belfast, November 16, 2010), <http://www.judiciary.gov.uk/NR/rdonlyres/CBB8FE3E-ACEB-49EE-B004-A0AAD2AAC3F8/0/speechlcjjurytrialsjsblecturebelfast.pdf>, accessed November 1, 2011.

[47] See Jason Deans, "Facebook juror jailed for eight months", *The Guardian* (London, June 16, 2011) <http://www.guardian.co.uk/uk/2011/jun/16/facebook-juror-jailed-for-eight-months> accessed November 1, 2011.

[48] Lord Judge (n.46).

[49] Caren Myers Morrison, "Jury 2.0" (2011) 62 Hastings Law Journal 1579, 1613.

settings on her profile, the Facebook post could be seen and read by anyone. After some users responded that the defendant should be found guilty, the court authorities were tipped off anonymously and she was dismissed from the jury.[50]

In March, 2011, a 20-year-old female juror from Detroit was caught posting on her Facebook page "actually excited for duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY". This was during a trial for resisting police arrest. The comment was apparently posted on a lay day in the proceedings, when the prosecution were still in their case and the defendant was yet to give evidence. The juror was found guilty of contempt of court and fined $250.[51]

In another case, a juror in a criminal trial in Victoria posted "everyone's guilty" on his Facebook page. Luckily, that posting was discovered before the trial had proceeded far, and after he had failed to show up for jury duty. The jury were discharged and the trial judge referred the matter for prosecution.[52]

The internet has also been used by jurors to criticise other jurors. In January, 2011, a Scottish juror used her Facebook page to post claims that the accused was innocent and that her fellow jurors were "scum bags" for convicting him.[53]

Special mention should be made of the potential for sites such as Twitter to challenge the functional viability of a jury. Twitter is a free social networking and micro-blogging service that has changed the way many people communicate. Twitter allows users to send "tweets", or text-based posts, up to 140 characters long via phone or internet. Thus, a juror in a murder trial in Washington, D.C.,

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[50] Urmee Khan, "Juror Dismissed from a Trial After using Facebook to Help make a Decision", *The Telegraph* (London, November 24, 2008) <http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html> accessed November 1, 2011. See also Amanda McGee, "Juror Misconduct in the Twenty First Century: The Prevalence of the Internet and Its Effects on American Courtrooms" (2010) 30 Loyola of Los Angeles Entertainment Law Review 301, 309.

[51] Jameson Cook, "Facebook post may get juror in trouble", *The Oakland Press* (Pontiac, August 29, 2010) <http://www.theoaklandpress.com/articles/2010/08/29/news/cops_and_courts/doc4c7b104667b75071959419.txt?viewmode=2> accessed November 1, 2011.

[52] Andrea Petrie, "No-show juror in hot water over 'stupid' actions", *The Age* (Melbourne, April 17, 2010) <http://www.theage.com.au/national/noshow-juror-in-hot-water-over-stupid-actions-20100416-skli.html> accessed November 1, 2011.

[53] Jasper Hamill, "Sheridan juror could face jail", *The Herald* (Glasgow, January 10, 2011) <http://www.heraldscotland.com/news/crime-courts/sheridan-juror-could-face-jail-1.1078830> accessed November 1, 2011.

was dismissed after tweeting "Guilty Guilty… I will not be swayed. Practicing for jury duty".[54]

A recent Reuters analysis undertaken in late 2010 revealed that blogging, tweeting and other online diversions were causing a headache with jurors in the United States. Researchers typed "jury duty" into Twitter's search engine and found that "tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes".[55] It may be inevitable that in the near future jurors will be subjected to questioning regarding their internet and social networking habits.

The examples above all represent improper contact by jurors broadcasting their opinions to the public, or at least a considerable sector of the public. But social media also makes direct interpersonal contact considerably easier than before. In what is colloquially known as the "Facebook five" case, Facebook was used by a number of jurors all of whom were Facebook friends to discuss the case.[56] Needless to say, discussions of trial matters in the absence of other jurors is not permitted.

But Facebook contact can take a much more sinister turn.

At first glance, Joanne Fraill would have appeared as a typical Facebook user. She was 40-years-old, a mother who had three children and three step-children. She was adept in using Facebook to communicate with the world. Her downfall came when serving as a juror in a trial for conspiracy to supply heroin and amphetamines. The trial collapsed in a spectacular fashion after it was discovered that Ms Fraill had communicated with her female co-accused (one of the defendants in the trial who by this stage had been acquitted) on Facebook, and had discussed jury deliberations. The pair exchanged 50 messages in a 36-minute chat about the trial including the latest position of the jury.[57] Her misconduct was discovered when the co-accused confided in her solicitor the following day. Both Fraill and

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[54] "Prospective Juror Tweets Self Out of Levy Murder Trial" *NBC Washington* (Washington DC, October 22, 2010) <http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html> accessed November 1, 2011.

[55] Brian Grow, "As jurors go online, US trials go off track", *Reuters US* (Atlanta, December 8, 2010) <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>, accessed November 1, 2011

[56] Del Quentin Wilber, "Social networking among jurors is trying judges' patience", *The Washington Post* (Washington DC, January 9, 2010) <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/08/AR2010010803694.html> accessed November 1, 2011.

[57] See "Facebook contempt of court case: transcript of the online chat", *The Guardian* (London, June 14, 2011) <http://www.guardian.co.uk/uk/2011/jun/14/facebook-contempt-of-court-transcript> accessed November 1, 2011.

the co-accused were convicted of contempt of court and Fraill was sentenced to eight months' imprisonment.[58]

New technologies make improper contact easier, but such contact existed long before their advent. Thus, a remarkable case of attraction between a juror and an accused – involving far greater contact than Joanne Fraill's Facebook chat – occurred in an eight-month murder trial held in 1995 in Vancouver, Canada. In this trial for two gang-related slayings, Gillian Guess was a juror, and became romantically attracted to one of the accused. Later on, in the jury room, she was instrumental in securing his acquittal. Immediately after the trial, she commenced a sexual relationship with him. She was eventually prosecuted for obstruction of justice, and her case was a *cause célèbre* in Canada. It represented the only case where a juror faced criminal sanctions for what happened in the jury room, and evidence was admitted, at her trial, of those very same jury room discussions.[59] Guess was found guilty and sentenced to 18 months' imprisonment, plus 12 months' probation. An appeal against that sentence was dismissed.[60]

Infatuation of a juror with an accused is by no means an isolated problem. In July, 1998, a juror had to be discharged, when she asked the trial judge for the accused's date of birth, as she wished to draw up his star-chart.[61]

Occasionally, a juror's infatuation is with someone else in court. Impropriety arguably may exist where a juror becomes sexually attracted to counsel in the case (usually counsel for the prosecution) and decides a case against an accused. Some years ago, in a trial where a female juror propositioned counsel in the days following the trial, the conviction appeal alleging impropriety was dismissed on the basis that the presumption of impartiality had not been rebutted.[62]

It is, however, beyond doubt that tweeting, emailing, or contacting the accused or a witness over Facebook, is far easier than getting hold of them by more traditional means, and most forms of social media will, subject to the public viewing settings on your social media page, broadcast what would formerly have been a private opinion – or one expressed to a few confidants – for all to see.

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58 *R. v. Fraill and Sewart* [2011] EWHC 1629 (Admin.), [2011] 2 Cr.App.R. 271; see also Deans (n.47).

59 Chris Wood, "Guess Guilty of Obstruction", *Maclean's* (Toronto, July 1, 1998) <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0011728> accessed November 1, 2011.

60 *Regina v. Guess* (2000) 150 C.C.C. (3d) 573.

61 Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales" (1999) Law and Contemporary Problems 7, 23.

62 *R. v. Alexander* [2004] EWCA Crim 2341.

4. The problem of intimidation, bullies and racists

It is trite to observe that one essential aspect of a jury is that they should be impartial. Impartiality requires that jurors be, and be seen to be, independent, disinterested and unbiased.[63] Because of the impenetrability of the jury's verdict, the potential problem of what actually happens in the jury room rarely gets aired.[64] But is this a problem that is restricted to isolated cases?

There is a dearth of research on the impact of intimidation on the jury deliberation process.[65] In the wake of a public outcry in Western Australia about acquittals due, allegedly, to the intimidation of juries, the Attorney-General there commissioned research into jurors' experience. The report revealed that, although the incidence of intimidation, whether actual or perceived, was relatively rare, there was a problem of intimidation taking place inside the jury room.[66]

How jurors suffer such intimidation was revealed by New Zealand research. In relation to four juries whose deliberations were the subject of disclosure, it appeared that deliberately intimidatory jurors were given free rein, refusing to discuss things rationally, making adverse or mocking comments about other jurors' opinions, hurling insults at them, and monopolising the process.[67] It is difficult to extrapolate much from the research as only four juries were involved, save that intimidation is not an isolated event.

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[63] Queensland Law Reform Commission (QLRC), "*A Review of Jury Selection: Discussion Paper*" (QLRC WP 69, 2010), para 5.9, fn.345, referring to to *Pullar v. United Kingdom* (1996) 22 E.H.R.R. 391, [29]-[30], *R. v. Abdroikov* [2007] UKHL 37, [2007] 1 W.L.R. 2679, [14]-[17]. This modern notion of how we value the jury is in marked contrast to its historical roots, whereby jurors were required to have local knowledge and expertise about the matter the subject of their deliberations (see Pt II, *ante*).

[64] Although *cf.* the position in Maryland, U.S.A., for example, where jurors may even talk to the media, describing jury room deliberations in detail: "Brittany Norwood Found Guilty of First-Degree Murder in Lululemon Slaying" *NBC Washington* (Washington DC, November 3, 2011) <http://www.nbcwashington.com/news/local/Brittany-Norwood-Found-Guilty-of-First-Degree-Murder-in-Lululemon-Slaying-133116703.html> accessed November 3, 2011 (note the repeated quotes from "juror 15A").

[65] Judith Fordham, *Juror Intimidation: an investigation into the prevalence and nature of juror intimidation in Western Australia* (Report to the Attorney General of Western Australia, approved for publication April 1, 2010) <http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf> accessed November 1, 2011. Fordham observes in her report that little research has been carried out in Australia, New Zealand, Canada or the United Kingdom which has focused on jury intimidation specifically (*ibid.*, 22).

[66] *ibid.*

[67] See Warren Young, Neil Cameron, Yvette Tinsley, New Zealand Law Commission (NZLC), *Juries in Criminal Trials, Part Two: A Summary of Research Findings* (NZLC PP37, vol. 2, 1999), paras 6.35-6.39.

On a more positive note, recent empirical research in relation to the jury system in England and Wales has revealed that racial considerations may be less of a problem there than previously thought.[68] The research revealed that jury conviction rates showed only small differences based on defendant ethnicity.[69]

Some practical suggestions have been advanced to minimise the potential for juror harassment. The jury's deliberations could be broken by "time out" at the direction of the trial judge – say for five or ten minutes per hour. Alternatively, the judge could proactively ask the jury whether they were having difficulties in their deliberations.[70]

5. Coercion of the jury: bribery, tampering and jury nobbling

Bribery and other forms of improper suasion of the jury have existed from the time of the early development of the common law jury[71] and remains as prevalent a practice today as in the past. It also remains as difficult to detect.

In England and Wales, concern about jury nobbling was instrumental in causing legislative change by introducing majority verdicts to prevent intimidation or bribing of jurors.[72] Legislation was also passed making it an offence to intimidate a juror or potential juror, intending to obstruct, pervert or interfere with the course of justice.[73] Where an acquittal is tainted by such intimidation, the High Court may quash the acquittal and order a retrial.[74]

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[68] Gillian Daly, Rosemary Pattenden, "Racial Bias and the English Criminal Trial Jury" (2005) 64(3) Cambridge Law Journal 678. See also Thomas (n.40), 20.

[69] See Thomas, *ibid.*, 24, fn.7.

[70] Phillip Boulten, "Trial by jury or trial by ordeal?", *Bar News* (New South Wales Bar Association, Winter 2011).

[71] See text at n.28.

[72] Introduced by *Criminal Justice Act* 1967, s.13: the relevant provision is now found in the *Juries Act* 1974, s.17. See *R. v. Mirza* [2004] UKHL 2, [2004] 1 A.C. 1118, [143]. As the unanimity requirement was seen as an incentive to intimidate, corrupt or improperly persuade jurors, it was posited that the availability of a majority verdict would mitigate such conduct, see NZLC, *Juries in Criminal Trials* (NZLC Rep. No. 69, 2001), 159.

[73] *Criminal Justice and Public Order Act* 1994, s.51(1).

[74] *Criminal Procedure and Investigations Act* 1996, s.54(3) and (4). The section only applies where a person has been acquitted and a person has been convicted of an administration of justice offence relating to, *inter alia*, a juror involved in proceedings leading to that acquittal (s.54(1)). An acquittal can only be quashed where the High Court is satisfied of the following four matters: (a) the person was only acquitted because of the interference or intimidation (s.55(1)), (b) because of lapse of time or for any other reason it would not be contrary to the interests of justice to make the order (s.55(2)), (c) the person who has been acquitted has a reasonable opportunity to make written representations to the court (s.55(3)), and (d) it appears to the court that the conviction for the administration of justice offence will stand (s.55(4)).

Such was the nature of the concern in England and Wales regarding the problem of jury tampering that the step of sanctioning judge-alone trials in relation to indictable offences was taken to remedy the problem.[75] That sanction has been held by the court not to diminish the fairness of the trial or any consequent safety of the convictions.[76] Further, it was also held that the right to trial by jury may be "created, extended, amended, reduced or abolished by statute".[77] Nor is it a right protected by the *European Convention on Human Rights*.[78]

Australia is not immune from allegations of jury tampering.[79] In almost all Australian jurisdictions, legislation providing for majority verdicts has been introduced.[80] Where federal offences are involved, however, the jury are required to return a unanimous verdict.[81] Legislation has been passed in Queensland and Western Australia permitting the court to take into account conduct constituting intimidation, corruption or threatening of a juror in determining whether to proceed by judge alone.[82]

In New Zealand, majority verdicts have been introduced.[83] Also, trials by judge alone are permitted upon application of the prosecution, where trials are likely to be long and complex or where

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75 *Criminal Justice Act,* s.44 (danger of jury tampering). Under that same Act, it was envisaged that a judge alone trial could be held in relation to complex fraud cases, but that provision has yet to come into force (s.44).

76 *R. v. Twomey (No 2)* [2011] EWCA Crim 8, [2011] 1 W.L.R. 1681, [45].

77 *ibid.,* [34].

78 The *Convention for the Protection of Human Rights and Fundamental Freedoms*; see *ibid.;* see also *R. v. Twomey* [2009] EWCA Crim 1035, [2010] 1 W.L.R. 630.

79 *R. v. Richards & Bijkerk* [1999] NSWCCA 114, (1999) 107 A.Crim.R. 318 (in light of allegation of jury tampering the judge ordered that the court be closed for the trial, that jurors be escorted to and from court and that they be sequestered for the duration of their verdict deliberations); *R. v. Elfar & Tier,* unreported, October 9, 1995, NSWCCA (comments by judge gave rise to a miscarriage of justice as they constituted an invitation to the remaining jurors to speculate that discharged jurors had been "got at" by one or more of the accused).

80 Available from 1927 in South Australia, *Juries Act* 1927 (s.57); in 1936 in Tasmania, *Juries Act* 2003 (ss.3 and 43); in 1960 in Western Australia, *Criminal Procedure Act* 2004 (s.114); in 1963 in the Northern Territory, *Criminal Code Act* 1983 (s.368); in 1994 in Victoria, *Juries Act* 2000 (s.46); and finally in New South Wales in 2006, *Jury Act* 1977 (s.55F). A unanimous verdict is still required in relation to trials held in the Australian Capital Territory.

81 *Commonwealth Constitution,* (s.80). See *Cheatle v. The Queen* [1993] HCA 44, (1993) 177 C.L.R. 541.

82 *Criminal Procedure Act* 2004 (W.A.), s.118, and *Criminal Code Act* 1899 (Qld), s.615 – it is a curious, if not self-defeating, feature of these provisions that no order regarding a judge alone trial can be made without the consent of the accused. For a review of the judge alone provisions operating throughout Australia, see Jodie O'Leary, "Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia" (2011) 35 Criminal Law Journal 154.

83 In 2009, see *Juries Act* 1981 (N.Z.), s.29C.

there are reasonable grounds to believe intimidation of the jury has occurred, is occurring or will occur.[84]

In Canada, there is no provision for majority verdicts under the *Criminal Code*. All verdicts must be unanimous.[85] Specific provision is made for trial by judge alone in certain circumstances.[86]

B. Solutions to juror misconduct

1. Legislation

There is no uniform legislation in Australia which covers jury impropriety and confidentiality of jury deliberations. That said, a number of Australian jurisdictions have enacted legislation which addresses these issues. In Queensland, there is a statutory prohibition on jurors making an inquiry into the accused, including any use of the internet to obtain that type of information.[87] Further, jury room confidentiality can be pierced during the currency of a trial where there are grounds to suspect bias, fraud, or an offence relating to a person's membership of the jury or to the performance of functions of a member of the jury.[88]

In New South Wales, jury deliberations may be disclosed to the court during the course of a trial where there are reasonable grounds to suspect any irregularity in relation to membership of the jury, or in relation to the performance of another juror's functions, where such would include, amongst other things, any misconduct, the refusal to take part in or lack of capacity to participate in the jury's deliberations, partiality, or reasonable apprehension of bias or conflict of interest.[89] A former jury member who has reasonable grounds to suspect any irregularity can complain to the sheriff.[90]

In Victoria, jurors are precluded from making an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial. This is defined to include research by any

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84 *Crimes Act* 1961 (N.Z.), ss.361D (long and complex trial) and 361E (intimidation of jurors). The validity of s.361D was upheld in *R. v. Wenzel* [2009] NZCA 130, [2009] NZSC 58, [2009] 3 N.Z.L.R. 47.

85 Peter Sankoff, "Majority Jury Verdicts and the *Charter of Rights and Freedoms*", (2006) 39 University of British Columbia Law Review 333.

86 *Criminal Code* 1985, as amended (s.536).

87 *Jury Act* 1995 (Qld), s.69A which carries a maximum penalty of 2 years imprisonment. The jury are given a very informative booklet to assist them in their deliberations and their attention is drawn to this section and s.70: see Queensland Courts, *Guide to Jury Deliberations* (Issued 2008), <http://www.courts.qld.gov.au/Factsheets/SD-Brochure-JurorsGuideDeliberations.pdf>, accessed November 1, 2011.

88 *Jury Act* 1995 (Qld), s.70.

89 *Jury Act* 1977 (N.S.W.), s.75C(1) and (4). The jury are directed by the trial judge upon being empanelled as to the effect of s.75C: see *Criminal Trials Court Bench Book* (n.35), Direction 1-520.

90 *Jury Act* 1977 (N.S.W.), s.75C(2).

means with specific reference being made to the internet, and viewing or inspecting an object that is relevant to the trial.[91] A person who is or was a juror is specifically permitted to disclose to the judge or a court any information about the deliberations of the jury.[92] In addition to the above the *Uniform Evidence Act*, as it applies in various Australian jurisdictions, would permit the admissibility of evidence of jurors in relation to matters affecting the conduct of a trial or of their deliberations.[93]

By virtue of the application of these provisions to the disclosure of an irregularity following completion of the trial, both New South Wales and Victoria permit appellate court review of the evidence of deliberations in the jury room and of whether a miscarriage of justice has been occasioned as a result of those deliberations.[94] In all three states, the trial judge is empowered to conduct an inquiry into jury room deliberations on the basis of suspected juror misconduct. The failure of a trial judge properly to address the misconduct could itself become the basis for holding that there had been a miscarriage of justice.[95] No similar legislation exists with regard to the remaining jurisdictions in Australia. The position with regard to New Zealand, and England and Wales, is dealt with below. In relation to Canada, whilst it is an offence to disclose jury deliberations, that provision

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[91] *Juries Act* 2000 (Vic.), s.78A. The trial judge directs the jury following empanelment as to the effect if s.78A, see Judicial College of Victoria, *Victorian Criminal Charge Book*, Direction 1.5.2 <http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm> accessed November 1, 2011. The Victorian courts have a useful website which provides a guide for serving on juries. Whilst the information about jury impartiality is useful, there is, apparently, no guidance in relation to what a juror should do regarding bias or harassment <http://www.courts.vic.gov.au/jury-service/juror-selection/juror-conduct>, accessed November 1, 2011. Anything done by the juror in contravention of a direction given by the trial judge is declared to be "not a proper exercise by the juror of his or her functions as a juror": see s.78A(4).

[92] *Juries Act* 2000 (Vic.), s.78(3)(a)(i).

[93] *Evidence Act* 1995 (Cth), (N.S.W.) and (A.C.T.), *Evidence Act* 2001 (Tas.), and *Evidence Act* 2008 (Vic.), ss.16, 129.

[94] Thus overcoming the difficulty of investigating jury impropriety after delivery of verdict because of the principle of secrecy of jury deliberations, which grounded a common law rule that, whilst jury impropriety could be investigated, any evidence obtained was strictly inadmissible, see *Mirza* (n.72). The principle is discussed by Laura McGowan, "Trial by Jury: Still a Lamp in the Dark?" (2005) 69 Journal of Criminal Law 518, 519. For the position with regard to Australia, see *R. v. Skaf* (n.36); *R. v. Rinaldi* (1993) 30 N.S.W.L.R. 605; *R. v. K* [2003] NSWCCA 406, (2003) 59 N.S.W.L.R. 431, and *R. v. Potier* [2005] NSWCCA 336 (in that case, a journalist wrote a book regarding his experiences as a juror on Mr Potier's trial and an attempt to call the journalist to give fresh evidence on the hearing of the appeal was refused).

[95] In this respect, see *R. v. Smith*; *R. v. Mercieca* [2005] UKHL 12, [2005] 2 Cr.App.R. 10.

does not prevent a juror from revealing any information which would be admissible in proceedings to impeach the jury's verdict.[96]

2. Taping of jury deliberations

It may be an unpalatable suggestion, but serious consideration should be given to reviewing the absolute prohibition on taping jury room deliberations. Currently no jurisdiction in Australia permits the taping of jury deliberations. No jury deliberations have ever been recorded in Australia.[97]

As discussed above, certain jurisdictions in Australia have remedial legislation relating to disclosure of jury deliberations. Taping, if permitted, could constitute direct evidence of the jury's deliberations and the integrity of the reasoning process. Such direct evidence would demonstrate whether the presumption ordinarily underpinning juror deliberations, that they comply with their oath and assiduously follow the trial judge's instructions, was well-founded and, even if not the case, whether a miscarriage of justice has been occasioned. For those jurisdictions which do not have such legislation, for example England and Wales,[98] the introduction of legislation, such as enacted in New Zealand, should be considered. That would permit evidence of deliberations of the jury to be adduced where the court is satisfied that the circumstances are "so exceptional that there is a sufficiently compelling reason".[99] That provision provides for the

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96 *Criminal Code* 1985, as amended, s.649; see also *R. v. Pan*; *R. v. Sawyer*, 2001 SCC 42, [2001] 2 S.C.R. 344.

97 See Jacqueline Horan, "Communicating with jurors in the twenty-first century" (2007) 29 Australian Bar Review 75, 93, fn.92.

98 *Contempt of Court Act* 1981, s.8 precludes any disclosure of jury deliberations, save in very limited circumstances.

99 The *Evidence Act* 2006 (N.Z.), s.76 is in the following terms:

> "**76. Evidence of jury deliberations**
>
> (1) A person must not give evidence about the deliberations of a jury.
>
> (2) Subsection (1) does not prevent the giving of evidence about matters that do not form part of the deliberations of a jury, including (without limitation)—
>
> (a) the competency or capacity of a juror; or
>
> (b) any conduct of, or knowledge gained by, a juror that is believed to disqualify that juror from holding that position.
>
> (3) Subsection (1) does not prevent a person from giving evidence about the deliberations of a jury if the judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.
>
> (4) In determining, under subsection (3), whether to allow evidence to be given in any proceedings, the judge must weigh—
>
> (a) the public interest in protecting the confidentiality of jury deliberations generally:
>
> (b) the public interest in ensuring that justice is done in those proceedings.".

weighing of public policy considerations which guarantee the secrecy of jury deliberations against the interests of justice.[100]

A study in Milwaukee of the impact of videoing juries has revealed that it did not seem to have any effect on jury deliberations.[101] Jurors in one case openly decided to ignore the evidence and acquit the defendant. This raises the spectre that access to the taped evidence may be used by the prosecution to overturn an acquittal, subject to legislation permitting such an appeal.

C. The challenge posed by complexity of criminal laws

Complexity, either in terms of facts or the law, makes reaching a verdict more difficult to achieve. This is because complex criminal laws require detailed directions to the jury regarding elements of the offence, available defences, as well as relevant warnings required to be given at common law and, more usually nowadays, by statute. The complexity, prolixity and ubiquity of directions given to the jury are under review in a number of jurisdictions in Australia at the current time.[102]

The review of directions to the jury is driven by various studies and research reports revealing that jurors, on the whole, have a great deal of difficulty understanding the law or the judge's instructions.[103] New Zealand research revealed that of the 48 trials examined, there were only 13 trials (27 per cent) where "fairly fundamental misunderstandings of the law at the deliberation stage did not emerge".[104] Empirical research into the same subject undertaken in England and Wales showed that when jurors were directed to answer two questions relating to whether the defendant acted in self-defence – those questions being whether the defendant believed it was necessary to defend himself and whether he used reasonable force – 31 per cent of jurors accurately identified both questions. A further 48 per cent correctly identified one of the two questions and 20 per cent did not correctly identify either question. The study did not attempt to examine how juror understanding affected deliberations,

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[100] For a discussion of s.76, see Dorne Boniface, "Juror misconduct, secret jury business and the exclusionary rule" (2008) Criminal Law Journal 18, 35.

[101] See Pamela R. Ferguson, "The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety" (2006) 10 International Journal of Evidence and Proof 180, 207-208, referring at fn.189 to W.R. Bagley, "Jury Room Secrecy: Has the Time Come to Unlock the Door?" (1998) 32 Suffolk University Law Review 481, 486.

[102] See n.127, *post*.

[103] See NSWLRC, *Majority Verdicts* (n.30), para 4.25.

[104] See Young *et al.*, NZLC, *Juries in Criminal Trials, Part Two* (n.67), para 7.12.

but no relationship was found between jury verdicts and the number of jurors who correctly identified the two legal questions.[105]

In Australia, the Queensland Law Reform Commission commissioned a research project into juror understanding of directions as to the *burden of proof* given by a trial judge. That research related to 14 trials that proceeded either before the Supreme or District Courts and a total of 33 jurors (out of total 168 jurors) agreed to participate. Only 61 per cent of jurors correctly understood the direction. Where the juror's sense of understanding of *burden of proof* was flawed, the more they relied on their common sense and the prosecution evidence, and the less they relied on defence evidence in arriving at a verdict.[106]

The advice that Kirby J. gave for trial instructions – that they should be comprehensible, not imposing unrealistic or over-subtle distinctions on the jury, distinctions which are counter-productive of the end sought – should apply in equal measure to criminal laws.[107]

Complexity of the law is in large measure driven by the need to cover the wide-ranging activity the subject of prohibition. By their nature, simple rules tend to be over or under inclusive in fulfilling their purpose, increasing the potential for undesirable consequences – and this is even more true of complex cases. In the absence of research into juror understanding of such complexity, there must be a sneaking suspicion that a flawed understanding of the law may well favour the prosecution, in much the same way as revealed by the Queensland research, above.

The *Criminal Code* 1995 (Cth) is a case in point. It arose out of the work of the Gibbs Committee which published a major report in 1990 regarding the general principles of criminal responsibility, together with a draft *Codifying Bill*,[108] and from work undertaken by the Model Criminal Code Officers Committee (MCCOC), later known as the Criminal Lawyers Officers Committee (CLOC).

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[105] See Thomas (n.40), 36-37. The missing one percent is due, no doubt, to rounding down.

[106] Blake McKimmie, Emma Antrobus and Ian Davis, *Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials* (November 2009) found as Appendix E to QLRC, *A Review of Jury Directions: Report, vol. 2* (QLRC R 66, 2009).

[107] *Zoneff v. The Queen* [2000] HCA 28, (2000) 200 C.L.R. 234, [65] (Kirby J.). Much the same sentiment was expressed by a Canadian jurist regarding judicial instructions; see David Watt, *Helping Jurors Understand* (Thomson Carswell 2007), 64: "[the] overall length of judicial instructions is apt to confound understanding. The longer the instruction, the greater the tedium. The more frequently the points are repeated, the greater the possibility that some parts will conflict or appear to conflict with another or other parts… Detail overwhelms substance. Confusion follows. And justice suffers" (footnote omitted).

[108] Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (Interim Report, 1990).

The codification was undertaken in a staged process commencing with the introduction, by the *Criminal Code Act* 1995 (Cth), of Chapter 2 of the *Criminal Code* (Cth) which provided general principles of criminal responsibility.[109] The code is meant to replace the common law regarding criminal responsibility. It came into effect on January 1, 1997.

Offences consist of physical elements and fault elements, and the law that creates an offence may provide different fault elements for different physical elements.[110] There is now an elaborate degree of parsing required in respect of any Commonwealth offence in order to determine how many physical elements there are in any particular offence and, once that is established, what the corresponding fault elements are.[111]

So far so good. The task is made more difficult and complex by the tripartite nature of the inquiry that needs to be undertaken as the physical elements of an offence may consist of conduct, the result of conduct ("result") and a circumstance in which conduct, or a result of conduct, occurs ("circumstance").[112] The fault element for a physical element can either be intention, knowledge, recklessness or negligence.[113] In addition, there are offences which have no fault element.[114] There are many offences found in the *Criminal Code* (Cth) which do not specify a fault element for a physical element. Current exegetical analysis of offences found in the code finds overlapping aspects of conduct, result and circumstance. Where a physical element *only* involves conduct, the default is that intention is the fault element.[115] Where the physical element consists of a circumstance or result, the default fault element is recklessness. Hence, it is conceivable and entirely possible that any direction to a jury in a Commonwealth trial today will have both intention and recklessness intermingled. If the legal profession is muddled and confused about all of this (I say nothing here of judicial officers), pity the poor jury who has to apply the directions of law regarding that offence.

This is not a call for the code to be abandoned, just an observation that any analysis of the problem should include an understanding of what drives the complexity of the current trial process. As the Canadian jurist David Watt remarked, one inherent

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109 NSWLRC, *Complicity*, (NSWLRC R129, 2010), paras 1.21 and 1.22.
110 *Criminal Code* 1995 (Cth), s.3.1.
111 *ibid.*, s.3.2.
112 *ibid.*, s.4.1.
113 *ibid.*, s.5.1.
114 *ibid.*, s.3.1(2).
115 *ibid.*, s.5.6(1).

difficulty in composing comprehensible jury instructions originates in the complexity of the law itself.[116]

In practice, the substantive offence charged may aggravate this complexity. For instance, in *R. v. Ansari*,[117] a number of brothers who ran a *bureau de change* were charged, in effect, with money laundering. The trial lasted some six months and the offence before the jury was a conspiracy to deal with money where there was a risk that the money would become an instrument of crime, with recklessness as to the fact that the money would become an instrument of crime.[118] The trial judge's directions were reduced to writing and occupied 18 pages, single spaced. The directions were fulsome and traversed the issue of substantial risk, instrument of crime, recklessness, unjustifiable risk, and conspiracy. It was a formidable task for the judge. Ultimately, the complexity of the case was mirrored in the High Court decision regarding the concept of recklessness as it applied to the physical elements of the offence.[119]

Little mention is made of the fact that the inspiration for the fault element analysis required to be undertaken for the *Criminal Code* 1995 (Cth) is the American Law Institute's *Model Penal Code*, which was released in 1962. What is remarkable is how similar the two codes are, although a mystifying aspect of the *Commonwealth Code* is why there is a variation in what is required for proof of knowledge. In both codes, there is a failure to define recklessness in relation to conduct. This creates certain difficulties, as there are many *Commonwealth Code* offences which could be categorised as having a physical element involving conduct for which the fault element is recklessness – for instance, "obtaining", "destroying" or "falsifying", to name just a few.

There is no way of telling whether the complexity of criminal laws is altering the way juries deliberate. The point has been recently made that it is not difficult to predict that the task of juries will become more difficult in the future, precisely because of the increase in the prosecution of complex corporate and financial crimes.[120] Short of testing jurors on their ability to understand instructions

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116 See Watt (n.107), 61. NSWLRC, *Jury Directions* (NSWLRC CP 4, 2008), para 9.4, makes much the same point, indicating that one way of improving the comprehension and accuracy of instructions regarding substantive law is to amend the relevant statutory provisions.

117 Unreported, November 10, 2006 (District Court); see also *Ansari v. The Queen* [2007] NSWCCA 204, (2007) 70 N.S.W.L.R. 89; and *Ansari v. The Queen* [2010] HCA 18, (2010) 241 C.L.R. 299; the author represented the defendants in this case (led by S.J. Odgers S.C. in the High Court).

118 *Criminal Code* 1995 (Cth), ss.11.5(1), 400.3(2).

119 See n.117, *ante*.

120 Hon. Justice Peter McClellan, C.J. at C.L., "Looking inside the jury room" *Bar News* (New South Wales Bar Association, Winter 2011) 64, 68.

before hearing the actual case, it is just not possible to make that assessment.[121] It may be that the complexity of certain criminal laws provides a compelling case for empanelling jurors with specialist skills and knowledge (see Pt IV, *post*). What is known is that simplicity is always to be preferred to complexity. Surely, the aim of the criminal law – in terms of its enforcement and understanding by all participants in the criminal justice system, particularly jurors charged with applying those same laws to the facts as they find them – ought to be simplicity.

D. Making the trial process more understandable to jurors

In recent years, Australia has seen considerable research – and substantial proposals for reform – aimed at making the jury trial process more understandable to jurors. That work has already brought tangible results in the form of changes to trial procedure intended to render the trial process less daunting for the lay juror. These steps include:

a) pre-trial education of jurors;[122]
b) judicial instructions at the commencement of the trial;[123]
c) the encouragement of juror participation in the trial process (note-taking, access to transcripts and asking questions);[124]
d) improved use of visual aids;[125]
e) length and timing of the summing-up;
f) the reduction of trial directions to written form for dissemination to the jury;[126]
g) a re-evaluation of the necessity to give particular directions or warnings to the jury during the course of the summing-up.[127]

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[121] The testing of jurors has in fact been suggested: see Bob Hycran, "The myth of trial by jury" (2005-2006) 51 Criminal Law Quarterly 157, 167.

[122] Boniface (n.100), 23.

[123] NSWLRC, *Majority Verdicts* (n.30), para.4.32.

[124] NSWLRC, *Jury Directions* (n.116), paras 10.4-10.11, 10.44-10.50; NSWLRC, *Majority Verdicts* (n.30), paras 4.20-4.24, 4.41-4.42; QLRC, *A Review of Jury Directions* (n.106), paras 10.73-10.144, 10.157-10.211; Horan (n.97), 100; Geoffrey Flatman, Mirko Bagaric, "Juries: Peers or Puppets – the Need to Curtail Jury Instructions" (1998) 22 Criminal Law Journal 207; James Wood, "The trial under siege: towards making criminal trials simpler" (District and County Court Judges Conference, Fremantle, WA, June 27-July 1, 2007) <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_jrtw01> accessed Novemer 11, 2011.

[125] See Horan, *ibid.* 98.

[126] See NSWLRC, *Majority Verdicts* (n.30), paras 4.37 to 4.39.

[127] See QLRC, *A Review of Jury Directions* (n.106); Victorian Law Reform Commission, *Jury Directions* (Final Report 17, 2009); and NSWLRC, *Jury Directions* (n.124). See also Justice Geoffrey Eames, "Tackling the complexity of criminal trial directions: What role for appellate courts?" (2007) 29 Australian Bar Review 161.

This research and these proposals for reform have been complemented by significant research into juror comprehension and understanding undertaken in New Zealand.[128] In addition, there are the surprising results of the research into the fairness of juries undertaken in England and Wales which revealed that jurors, regardless of ethnic background, do not racially stereotype black, Asian or white defendants as more or less likely to commit certain crimes.[129]

Each of these steps could improve the criminal trial process, and builds on the rich history that underpins the notion of a jury of one's peers.[130] Further, it is fitting that the process of interaction between judge and jury is continually changing to reflect socio-cultural change and the continuing impact of technological development.

Beyond this, various options for reform have been advanced to address jurors' understanding of directions of law *within the jury room*. Many of these suggestions have the added benefit of guarding against certain forms of juror misconduct. One is that when the jury retire to consider their verdict, the judge should retire with them to assist and guide them in their deliberations.[131] This is a variation of the

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[128] NZLC, *Juries in Criminal Trials* (NZLC Rep. No.69, 2001), referred to extensively by Justice Geoffrey Eames, "Towards a better direction – Better communication with jurors" (2003) 24 Australian Bar Review 35. Eames (at 42-43) makes the salient observation that Young *et al.* indicated that the length of jury charges varied from 20 minutes or less (in 4% of cases), at the one extreme, to the other "extreme" of jury charges that took more than an hour; in only about 20% of the cases did the charge take more than an hour; in only half of those 20% of cases, was it longer than 90 minutes: Young *et al.*, NZLC, *Juries in Criminal Trials, Part Two* (n.67), paras 7.6 to 7.8. The duration of the charge in all Australian jurisdictions is significantly longer and increases in length depending on whether it is a five, ten or twenty day trial: see James R.P. Orgloff *et al.*, *The Jury Project: Stage 1 – A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration 2006), 26-28. In contrast, in Scotland there is no requirement to summarise the evidence and any attempt to do so is deprecated – a skilled judge is expected to charge the jury in 15-18 minutes, even in lengthy cases: see Moses L.J., "Annual Law Reform Lecture: Summing Down the Summing-Up" (Inner Temple, London, November 23, 2010) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-moses-lj-summing-down-summing-up.pdf>, accessed November 11, 2010.

[129] The results are surprising given empirical research and academic articles which had suggested a greater role for race as a determinative factor in arriving at a verdict: see Thomas (n.40), 20; Daly, Pattenden (n.68); Darbyshire, Maughan, Stewart (n.26), 13-16.

[130] Colin Davies, Christopher Edwards, "'A Jury of Peers': A Comparative Analysis" (2004) 68 Journal of Criminal Law 152.

[131] Justice Roslyn Atkinson, "Juries in the 21st Century; Making the Bulwark Better" <http://greekconference.com.au/papers/2009/atkinson.pdf>, accessed 1 August 2011. Justice Atkinson raises two fundamental problems with such a course. First, any advice or assistance to juries would be given in private rather than in open court. Second, it increases the role of the judge at the expense of ordinary members of the community.

French criminal trial model where the judicial officer is present in the jury room.[132] Another is that a jury facilitator should be provided – a person trained and experienced in helping groups come to decisions. Such a person would not be entitled to vote or express an opinion regarding the evidence, but would try to ensure that the jury's deliberations focused on consideration of the evidence, and to minimise the discussion of irrelevant matters and the airing of biased opinions.[133]

IV. PROTECTING THE JURY TRIAL – LESSONS FROM THE PAST, LESSONS FOR THE FUTURE

As discussed earlier, the jury has taken many different forms since medieval times. The changes to the jury reflect prevailing conditions and the need to address specific societal needs. Reforms designed to preserve and protect the modern jury, may draw on an appreciation of its historical development.

A. Special juries

It has recently been suggested that consideration be given to requiring jurors to have a minimum level of knowledge or skill to carry out their functions. This could take the form of professional jurors who repeatedly serve on juries, minimum educational levels, or specialist technical experts matched to appropriate trials.[134]

Despite criticism that the introduction of special juries would be elitist and counter to the current policy of jury egalitarianism, it has been argued that the introduction of such a jury would improve the integrity of the process. Such jurors are less likely to be swayed by prejudicial publicity and would be more inclined to comply with trial directions.[135]

This proposal clearly invokes the history of trial by jury where, for many centuries, special juries sat side by side with the common jury. Indeed, before its demise, the special jury was viewed as having particular merit – so much so that Sir Fitzjames Stephen concluded that a judge and a special jury constituted an excellent tribunal, but that a judge alone was better than a common jury.[136] That sentiment was, of course, expressed at a time when juries faced less complexity and trials were measured in hours and days rather than the current

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[132] Paul Fitzpatrick, "The British Jury: An Argument for the Reconstruction of the Little Parliament" [2010] 6 Cambridge Student Law Review 1, 12-15.

[133] See Fordham, (n.65), 117. See also Ferguson (n.101), 205.

[134] Anthony Gray and Eola Barnett, "Sustainable juries: Thinking outside peer jury criminal trials" (2010) 20 Journal of Judicial Administration 18, 35.

[135] *ibid.*, 37-38.

[136] See Jackson (n.18), 379.

standard of weeks and months. It may be that a special jury will become the excellent tribunal extolled by that learned jurist.

B. Sequestration

All options should be considered in order to protect the integrity of the jury system. Juries in the past were sequestered until they reached a verdict – including, if necessary, being accommodated overnight. Sequestration is an option that must be given appropriate consideration. Even Spigelman C.J. indicated, in the context of jury consideration of internet searches, that "[in] some cases it may be necessary to return to the past practice of sequestering the jury".[137]

The practice in New South Wales is to permit jurors to separate, where the court so orders, at any time after they retire to consider their verdict.[138] Similar provisions exist in other Australian jurisdictions.[139] In New Zealand, since December 2008, routine sequestration of juries whilst in the process of deliberating has been abolished, except where the judge or court considers that it is in the interests of justice that the jury remain sequestered during those deliberations.[140] In Canada, mandatory sequestration of juries during their deliberations still prevails.[141]

The problems associated with sequestration are well known, particularly the additional costs associated with accommodation. Another downside to sequestration is that there is a potential for feelings of intimidation experienced by "dissidents" on the jury to be exacerbated. As one juror in the United States is quoted as saying, "[until] you've been sequestered, you can't imagine how horrible it is. It makes you feel powerless and helpless".[142] The issue of

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[137] *John Fairfax Publications Pty Ltd v. District Court of New South Wales* [2004] NSWCA 324, (2004) 61 N.S.W.L.R. 344, at [65]; see also "The internet and the right to a fair trial" (2005) 29 Criminal Law Journal 331, 337. Even in Commonwealth matters, to which s.80 of the *Commonwealth Constitution* applies, sequestration has been determined by the High Court not to be necessary to protect the integrity of the jury's verdict or to secure an independent deliberative process: see *Brownlee v. The Queen* [2001] HCA 36, (2001) 207 C.L.R. 278 discussed by James Stellios, "The Constitutional Jury- 'A Bulwark of Liberty'?" (2005) 27 Sydney Law Review 113, 124.

[138] *Jury Act* 1977 (N.S.W.), s.54.

[139] *Juries Act* 1927 (S.A.), s.55 (court may permit separation "if there are proper reasons to do so"); *Jury Act* 1995 (Qld), s.53 (court may permit separation after verdict if it "would not prejudice a fair trial"); *Juries Act* 2000 (Vic.), s.50.

[140] *Juries Act* 1981 (N.Z.), s.29A. The reforms in New Zealand were introduced following recommendations contained in the report NZLC, *Juries in Criminal Trials* (n.128), paras 400 to 411.

[141] *Criminal Code* 1985, as amended, s.647. See also Department of Justice (Canada), Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Jury Reform,* (2009), para. 3.5.1.

[142] James Levine, "The impact of sequestration on juries" (1995-1996) 79 Judicature 266, 270.

sequestration of juries therefore requires more detailed scrutiny, if mandatory sequestration is to be considered. Indeed, some of the concerns may be allayed by combining sequestration with other measures, such as the use of jury facilitators, or taping jury deliberations.

C. Peremptory challenges – lessons from Australia

Those legal practitioners who travel throughout Australia in pursuit of their practice will be fully aware that a "jury of one's peers" in Townsville in the far north of Queensland is very different from a "jury of one's peers" in Melbourne. Such juries reflect the geographical and socio-economic differences that exist within Australia. The right of peremptory challenge – both on the part of the Crown and the accused – has been seriously questioned, on the basis that the rising popularity of empanelling by numerical juror identification obviates the need for peremptory challenges in contemporary trials.[143]

The practice of peremptory challenges of jurors without having to show cause, in Australia, is one that varies according to jurisdiction. In the Northern Territory, each party has twelve challenges if the offence carries mandatory life imprisonment, and six challenges if not.[144] Queensland and the Australian Capital Territory give the parties eight challenges each;[145] Victoria has six challenges for an individual accused, which is reduced to five each if jointly tried, and four challenges each where a joint trial of three or more accused is held;[146] and New South Wales, South Australia and Western Australia,

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[143] Jacqueline Horan, Jane Goodman-Delahunty, "Challenging the peremptory challenge system in Australia" (2010) 34 Criminal Law Journal 167. For the authors' views on peremptory challenge hear the audio or read the transcript of the Radio National Law Report segment, see <http://www.abc.net.au/rn/lawreport/stories/2011/3087056.htm>, accessed November 1, 2011. In New South Wales and Western Australia, nothing is known about a prospective juror prior to balloting a jury in a criminal trial: each juror is allocated an identification number and when that number is drawn from a box of cards they then proceed to be sworn, see *Jury Act* 1977(N.S.W.), s.48; *Juries Act* 1957 (W.A.), s.36. In Victoria and the Australian Capital Territory, the names and occupations of jurors are called out during the process of balloting: *Juries Act* 2000 (Vic.), s.36; *Juries Act* 1967 (A.C.T.), s.31. In the remaining Australian jurisdictions, balloting takes place by calling out the names of jurors from cards drawn out of the box: *Juries Act* 1927 (S.A.), s.46; *Juries Act* 2003 (Tas.), s.29; *Juries Act* 1979 (N.T.), s.37.

[144] *Juries Act* (N.T.), s.44(1). The prosecution also have the right to ask the judge to "stand aside" six jurors (s.43).

[145] *Jury Act* 1995 (Qld), s.42(3) and (5); *Juries Act* (A.C.T.), s.34(2). In the A.C.T., in addition, the prosecution have the unlimited right to have jurors "stand aside" (s.33).

[146] *Juries Act* 2000 (Vic.), s.39(1). Whilst the Crown do not have a right of peremptory challenge, they retain the right to have a juror "stand aside": six jurors where there is one person arraigned, ten if there are two persons jointly arraigned,

three challenges each.[147] Tasmania gives an accused six challenges, but none to the Crown.[148] Opponents of peremptory challenges usually find support for their position in the example of England and Wales, where such challenges were abolished in 1988, and of Scotland, which abolished peremptory challenges in 1995.[149] The right of peremptory challenge is retained in New Zealand and in Canada.[150]

There is solid support for the retention of the right of peremptory challenge without cause in Western Australia.[151] In New South Wales, there is support to retain peremptory challenges, with the rider that the right be kept "under review to ensure that it does in fact advance the fairness of trial by jury, and does not in fact involve a distortion of the process".[152] Currently, any challenge of the jury for poll and array is an illusory right, surviving on the statute books as a mere historical artefact. In practical terms, it is redundant, as the defence are not given any information upon which to base such a challenge. If peremptory challenge were abolished, it would therefore represent a virtual removal of the rights of an accused to control any aspect of a jury. As has been remarked elsewhere, in England and Wales there is virtually no mechanism to ensure a racially mixed jury.[153]

Over thirty years ago, Barwick C.J. stated that

> "[t]he right of challenge, and particularly the right of peremptory challenge, lies at the very root of the jury system as it now exists. That the challenge is peremptory means that the accused need not in any wise justify his challenge. It need represent no more than his personal objection to be tried by the person he sees before him and whose name he has heard."[154]

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and four jurors for each person arraigned in a joint trial of three or more accused (s.38(1)).

147 *Jury Act* 1977 (N.S.W.), s.42(1); each party also has an additional peremptory challenge in the event that reserve jurors are to be selected. *Juries Act* 1927 (S.A.), s.61(1); if there is more than one accused, each accused has the right to three peremptory challenges (s.65); *Criminal Procedure Act* 2004 (W.A.), s.104(4): if there is more than one accused, each accused has the right to three peremptory challenges.

148 *Juries Act* (2003) (Tas.), s.35. Whilst the Crown does not have a right of peremptory challenge, it has an unlimited right to "stand aside" jurors (s.34).

149 *Criminal Justice Act* 1988, s.118 (England and Wales); *Criminal Justice (Scotland) Act* 1995, s.8.

150 *Juries Act* (1981) (N.Z.), s.24; *Criminal Code* 1985, as amended, s.634.

151 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report* (LRCWA Project No. 99, Final Report, 2010), 23.

152 NSWLRC, *Jury Selection* (NSWLRC R117, 2007), para. 10.42.

153 See Darbyshire, Maughan, Stewart (n.26), 15.

154 *Johns v. The Queen* (1979) 141 C.L.R. 409, 418. As Blackstone said, "how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not

Further to these comments, it is submitted that that not much has changed, and that the abolition of peremptory challenges, particularly in Australia, is unwarranted.

V. THE QUEST FOR THE REASONED VERDICT

Appeals against conviction are argued on the basic assumption that trial by jury is fair, that juries listen to and follow directions of law, and that their decision is based on the evidence which has been adduced at trial. This is so even though no reasons are given by a jury in relation to their verdict.[155] There have been calls for common law juries to provide reasons for their verdict.[156] Such a fundamental change to the trial process would create additional pressures on a jury –internal pressures on the deliberative process.

There has been much debate in Europe over whether the failure of a jury to give reasons for their verdict constituted a breach of Article 6(1) of the European Convention on Human Rights, relating to the entitlement to an independent and impartial tribunal. Richard Taxquet was sentenced in 2004 by the Liège Assize Court to 20 years' imprisonment for the murder of Belgian Minister André Cools and the attempted murder of Cools' partner. The murder exposed one of Belgium's largest political corruption scandals, led to the conviction of several government ministers and prompted the suicide of one of those alleged to have murdered the minister.

Criminal trial proceedings in Belgium are conducted by a panel of three judges and twelve lay jurors who, when they retire to consider their verdict, do so without the assistance of the trial judges. The jury were set a series of questions on aspects of the alleged murder and attempted murder. Was Taxquet a principal or a joint principal? Had he premeditated the homicide? To each of the thirty-two questions posed, the jury had to answer with one of two mono-syllables – "yes" or "no".[157] Only four of those questions related to Taxquet, as the balance referred to his seven co-defendants.

The critical feature of the Belgian process, from the point of view of the common lawyer, is that there is no judicial summing up.[158] The jury retire and return a verdict, having answered the questions posed. The jury convicted Taxquet and he appealed to the European Court of Human Rights. The claim made on the appeal was that

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that that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike": Morrison (n.1), Book IV, Ch.27, 278.

155 See *Mirza* (n.72), [155].

156 Richard L. Lippke, 'The Case for Reasoned Criminal Trial Verdicts" (2009) 22 Canadian Journal of Law and Jurisprudence 313.

157 David Rhodes, "Quixotic endeavours" (2010) 154 Solicitors Journal 6.

158 See Lord Judge (n.46).

Taxquet's human right to a fair trial guaranteed by Article 6(1) implied a right to a reasoned verdict, irrespective of whether the verdict was rendered by a judge or a lay jury.[159] In a chamber decision the court concluded that the requirement to give reasons for a verdict will not be satisfied by monosyllabic answers to basic questions.[160]

That decision was then appealed by the Kingdom of Belgium to the Grand Chamber. The Grand Chamber concluded that Taxquet's trial was unfair in that he had not been afforded sufficient safeguards to understand why he had been found guilty.[161] Even in conjunction with the indictment, and notwithstanding that Taxquet had been present in court whilst the evidence had been given, the questions put to the lay jury did not enable him to identify which items of evidence and factual circumstances ultimately caused the jury to answer the four questions about him in the affirmative. There was no way of determining whether any distinction could be drawn between any of the co-defendants, what his role was, and why his offence was classified in the way that it was by the jury.[162]

The court recognized that the system of trial by jury that existed in England and Wales arguably satisfied the test for a fair trial in that the verdict, following as it does from a properly structured summing-up, provided ample opportunity for the defendant, and the public at large, to understand the reasons why a jury had decided that the case against the defendant had been proved.[163] In addition, contrary to the position in Belgium, in England and Wales the defendant had the ability to appeal his conviction and review the basis of his conviction, review the process of trial by jury and the performance of the trial judge.[164]

There is still support for the proposition that juries should provide reasons, even if they be brief, for their verdict.[165] The difficulty is, do the reasons have to be given by the individual juror (because each juror does not necessarily have to rely on the same evidence in order to reach the ultimate decision) or collectively? If the latter, is it a step too far to impose the obligation of reaching agreement as to the reasons for a verdict? Will the mystique of the jury system collapse if

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159 Paul Roberts, "Does Article 6 of the *European Convention on Human Rights* Require Reasoned Verdicts in Criminal Trials" (2011) 11 Human Rights Law Review 213, 219.

160 *Taxquet v. Belgium* (2009) App. No. 926/05, Merits (January 13, 2009).

161 *Taxquet v. Belgium* (2010) App. No. 926/05, Judgment (Grand Chamber) (November 16, 2010) [100].

162 *ibid.*, [97].

163 See Lord Judge (n.46), 9.

164 *ibid.* As for the position of a defendant appealing the basis of his conviction in Belgium, see *Taxquet*, Judgment (n.161), [99].

165 See Lippke (n.156), 324.

the true reasons for verdicts are known? Reasoning and explaining one's process of reasoning are quite distinct practical tasks, and it is plausible that persons may be much better at performing practical reasoning and implementing its results than in explaining how they did it.[166]

VI. CONCLUSION

It is difficult to predict the precise form that the common law jury of the future will take. Will it remain a body that is constituted by lay jurors given the authority to determine the guilt of an accused, in relation to which no reasons are expected or required to be given? Whilst the current challenges for the jury are, for the most part, novel, they are not insurmountable.

The rich history of the jury provides a foundation stone upon which measures for reform can be assessed and implemented. If the jury as we know it ceases to be effective, then it is society as a whole that will suffer. As that great chronicler of American society, Alexis de Tocqueville, said:

> "[to] regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still."[167]

Whether and to what extent society would allow the institution of the jury to be overhauled is a question that needs to be raised and discussed. The mere fact that complex criminal laws may challenge an individual juror's critical understanding and appreciation of the allotted task is not enough to justify reducing the capacity of the lay jury to determine such matters. That would be to throw the baby out with the bathwater. It is far preferable to ask the question: "to what extent have we made the task of being a juror more difficult, and what can be done to remove that difficulty?" It is a question that legislators must consider, and one that cannot be ignored.

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[166] See Roberts (n.159), 235.

[167] Alexis de Tocqueville, *Democracy in America* (Anchor 1969), 272.

"CRIMINAL CASE RESOLUTION" IN THE SUBORDINATE COURTS OF SINGAPORE

*KESSLER SOH**

ABSTRACT

The facilitation of early criminal case resolution and the reduction of "cracked" trials are important ways to optimise the use of judicial resources. This article highlights salient practices in selected jurisdictions (United Kingdom, New Zealand, Victoria, California and Arizona) in respect of judge-facilitated case resolution processes and the giving of advance indications of sentence by the court. The article also describes the broad features of the existing judge-facilitated "criminal case resolution" (CCR) process in the Subordinate Courts of Singapore.

I. INTRODUCTION

Courts today face a common challenge. Caseloads are increasing relentlessly, while judicial resources remain finite and limited. Cases need to be disposed of efficiently and without undue delay, while meeting public expectations of access to and quality of justice. Courts need to optimise resources and find ever better ways to move cases along towards disposition. Active case management has become a necessity.

In the Subordinate Courts of Singapore, a key challenge has been to reduce the occurrence of "cracked" trials. A cracked trial occurs where the defendant (the accused person) elects to be tried and hearing dates are allocated for the trial, but the case is resolved on the first day of the trial or soon thereafter, either by a plea of guilt by the defendant, or withdrawal of the charges by the prosecution. A high incidence of cracked trials is undesirable, as it means that judicial resources are not being used optimally. It also represents wasted trial preparation by the parties, and unnecessary stress and inconvenience for the victims and other witnesses called to testify. In January 2010

* LLB (Hons.), District Judge, Subordinate Courts of Singapore. An earlier draft of this article was presented at the Australasian Institute of Judicial Administration conference on *Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration*, Sydney, September 7-9, 2011. My colleagues, Senior District Judge See Kee Oon and District Judges Janet Wang and Paul Quan, contributed to an earlier CCR internal working paper, which is the subject matter of the present article. I also acknowledge the research assistance provided by student interns Ms Carmen Lee and Mr Wilbur Lim.

the rate of cracked trials in the Singapore Subordinate Courts stood at about 43 per cent.[1]

With a view to minimising the incidence of cracked trials, a pilot initiative known as "criminal case resolution" (CCR) was introduced in late 2009. Under this programme, suitable criminal cases could be referred for voluntary mediation facilitated by a senior judge. CCR provides an avenue for prosecution and defence counsel to explore the possibility of early resolution without a trial.

This article describes briefly the broad features of the existing CCR framework. It also gives an overview of salient practices in selected jurisdictions: United Kingdom, New Zealand, Victoria (Australia), Arizona and California (U.S.A.).[2] The focus of this article is on *judicial involvement* in criminal case resolution, such as judge-facilitated case resolution processes and the giving of advance indications of sentence. It is primarily descriptive and is not intended to be an analysis of the jurisprudential or philosophical basis of criminal case resolution. It is also recognised that there are non-judicial initiatives which may be key to the early resolution of criminal cases, such as plea negotiations between the prosecution and the defence,[3] which are not within the scope of this article.

II. SALIENT PRACTICES IN SELECTED JURISDICTIONS

A. United Kingdom – Guidelines for Sentence Indications

In the past, judges in the United Kingdom were effectively prohibited from giving any sentence indication in advance of a guilty plea. The fundamental principles derived from *R. v. Turner*[4] were that:

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1 Chief Justice Chan Sek Keong (Singapore), "Access to Quality Justice For All", keynote address at the Subordinate Courts Workplan 2010 (26 February 2010), [12] <http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2010/CJ's%20Keynote%20Address%20Feb%202010.pdf > accessed September 1, 2011.

2 For a report on voluntary criminal conferencing in Quebec (Canada) and Western Australia, as well as criminal conferencing in New South Wales, South Australia and Victoria, see Fiona Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010).

3 This process is often referred to as "plea bargaining". Plea bargaining models vary across jurisdictions and typically take place between the prosecution and the defence without the involvement of the court. The process of plea bargaining may include one or more of the following: (a) *charge bargaining* (negotiating for less serious charges or fewer charges in return for a guilty plea); (b) *fact bargaining* (negotiating the facts to be mentioned by the prosecution when the plea is taken, which may have an impact on the sentence); (c) *sentence bargaining* (negotiating a lighter sentence, or obtaining the agreement of the prosecution not to press for a particular sentence). The "bargain" reached may, in some jurisdictions, be formalised in a binding plea agreement.

4 [1970] 2 Q.B. 321.

(i) the defendant is personally and exclusively responsible for his plea;
(ii) when the defendant enters the plea, it must be entered voluntarily, without improper pressure; and
(iii) there is to be no bargaining with or by the judge.[5]

It was also decided in *Turner* that the judge should never indicate the sentence which he is minded to impose, subject to one exception – namely, that "it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, *e.g.*, a probation order or a fine, or a custodial sentence".[6]

This practice was reviewed in 2005 in *R. v. Goodyear*,[7] where the Court of Appeal issued guidelines (the "*Goodyear* guidelines"[8]) under which advance indications of sentence for proceedings in the Crown Court could be given. The Court of Appeal recognised certain potential advantages in the giving of sentence indications. The defendant would make a better informed decision whether to plead, or not. This would result in an increased number of early guilty pleas, with a consequent reduction in the number of trials, and the number of cases which are listed for trial and which "crack" at the last minute. It could also result in a reduction in the number of appeals against sentence. In short, it would lead to an increase in the efficient administration of justice, without impinging on the defendant's entitlement to tender a voluntary plea.[9]

Under the *Goodyear* guidelines, a sentence indication should not be given by a judge unless one has been sought by the defendant. However, the judge may, if he sees fit, exercise the power recognised in *Turner* to indicate that the sentence, or type of sentence, would be the same, whether the case proceeded as a plea of guilty or went to trial with a resulting conviction. The judge retains an unfettered discretion to refuse to give an indication or postpone doing so, with or without giving reasons. The judge is most unlikely to be able to give an indication in complicated and difficult cases, unless issues between the prosecution and the defence have been addressed and resolved. The judge may also defer the granting of an indication until such time as he feels able to give one, for example, when a pre-sentence report is available or when the judge is sufficiently familiar with the case to give an informed indication.[10]

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5 As summarised in *R v. Goodyear* [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [30].
6 *Turner* (n.4), 327D.
7 *Goodyear* (n.5).
8 *ibid.*, [53]-[78].
9 *ibid.*, [53].
10 *ibid.*, [55]-[59].

An indication should not be given on the basis of hypothetical facts. An indication should also not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Unless there is an agreed, written basis of plea, the judge should refuse to give an indication. An indication should also not be given until the judge has concluded that he can properly deal with the case without the need for a *Newton*[11] hearing.[12]

It was emphasised by the Court of Appeal that the judge should not become involved in the plea bargaining process.[13] The judge should not be asked to indicate levels of sentence which he may have in mind depending on possible different pleas. It is not a process by which the judge should give some kind of preliminary indication, leading to comments on it by the prosecuting counsel, with the judge then reconsidering his indication, and perhaps raising it to a higher level, with counsel for the defendant then making further submissions to persuade the judge to reduce his indication. Such a process would smack of the kind of bargaining process which should be avoided.[14]

Any advance indication of sentence should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought. It would be unwise to give any indication of sentence after a trial in advance of it. Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. The judge who has given an indication should, where possible, deal with the case immediately or at a subsequent hearing before him. If that is not possible and the case comes before another judge, judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated requires that the later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will

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11 *R v. Newton,* 77 Cr.App.R. 13.

12 *Goodyear* (n.5), [62], [66], [70](a). A *Newton* hearing often arises in the context where a defendant pleads guilty to an offence and asserts certain material facts in the mitigation plea which are disputed by the prosecution. At the *Newton* hearing, the court is presented with the conflicting evidence of the prosecution and the defence, for the factual issues to be determined prior to passing sentence. Generally, such a hearing is held only where the disputed facts are likely to have a material impact on the appropriate sentence.

13 As to which, see n.3.

14 *ibid*., [67], [71].

cease to have effect. The ability of the Attorney-General and the defendant to appeal against the sentence is unaffected.[15]

Procedurally, any sentence indication would normally be sought at the plea and case management hearing.[16] However, the entitlement of a defendant to seek an indication at a later stage, or even during the course of the trial itself, is not ruled out. The hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence. Any reference to a request for a sentence indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial. As the case may yet proceed as a trial, reporting restrictions should normally be imposed, to be lifted if and when the defendant pleads or is found guilty.[17]

B. New Zealand – Status Hearings and Sentence Indications

In New Zealand, "status hearings" have been in operation in a majority of the district courts since 1995.[18] They were intended to overcome the problem of cracked trials clogging the courts' schedules, by the offering of sentence indications. The broad aims of status hearings are: to resolve cases earlier; to ensure better use of court resources; to stop cases that can be satisfactorily disposed of at an earlier stage from being set down for defended hearings; to contribute to smoother proceedings at the defended hearing stage for cases that can only be resolved by a defended hearing; to ensure an appropriate plea is entered at the first opportunity; to reduce the time taken to hear each case by limiting the evidence to the facts in issue.[19]

There is no statutory basis for status hearings, but they are authorised by the district courts' inherent power to regulate their own proceedings. In all summary matters (where a jury trial is not elected or mandated), if the defendant pleads not guilty, a status hearing will be scheduled ideally six weeks before the substantive trial. Fundamental to the early disposition of status hearings is the

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15 *ibid*., [54], [61], [70(c)], [72].

16 The plea and case management hearing is conducted to prepare a case for trial in the Crown Court: r. 3.8(3), Part 3 (Case Management) of the UK *Criminal Procedure Rules* 2010 <http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/criminal/procrules_fin/contents/rules/docs/pdf/crim-pr-2010-part3.pdf> accessed September 1, 2011.

17 *Goodyear* (n.5), [73]-[77].

18 Chief District Court Judge Russell Johnson (New Zealand), "A looking Glass on summary sentencing in New Zealand", (Sentencing Conference, National Judicial College of Australia / ANU College of Law, February 2008), [27] *et seq*. <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2008/Sentencing%20Conference%202008/papers/Johnson%20R.pdf> accessed September 1, 2011.

19 *ibid*., [28].

provision of a disclosure package by the prosecutor containing all the material on the police file to assist the defendant in making an informed plea and to encourage informed discussion between the parties. Status hearings are dependent on the defence and the prosecution clarifying the issues in dispute and engaging in charge negotiations prior to the hearing, and the judge's facilitation can increase the effectiveness of both.[20]

Present at the status hearing would be the judge, the defendant, defence counsel (if there is one), the prosecutor, victim advisers and community probation officers. Status hearing courts are open to the media, who may attend, as well as the general public and any interested parties, such as the victim. Other witnesses would not ordinarily be present. The process generally involves defence counsel explaining the current status to the judge, which may at that time include a change of plea. Counsel may request a sentence indication, at which point the prosecution will be asked to give their view of the case and the judge may ask questions. Overall, status hearings have more of a consultative as opposed to adversarial nature.[21]

A primary function of the status hearing is to give a sentence indication.[22] Sentence indications can, however, be given at any time prior to the court finding guilt or innocence and are not limited to status hearings.[23]

The *District Court Bench Book* provides guidelines for the giving of a sentence indication at a status hearing.[24] Under the guidelines, a sentence indication will be given only if asked for by the defendant. An indication will not be given unless the judge has the police summary of facts and the list of previous convictions and, where appropriate, a victim impact statement, along with any other information necessary to enable the judge to assess the proper sentence. A judge who lacks sufficient information should decline to give any indication. The defence cannot be compelled to disclose anything, but can give the judge such material as they wish. Consultation with all parties, police, victims and the defendant is essential.

The guidelines also stipulate that any sentence indicated must accord with the principles and aims of the *Sentencing Act* 2002.

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20 *ibid.*, [29]-[31].

21 *ibid.*, [32], [36].

22 New Zealand Law Commission, *Report 89: Criminal Pre-Trial Processes: Justice Through Efficiency* (2005), [294] <http://www.lawcom.govt.nz/sites/default/files/publications/2005/06/Publication_97_316_R89.pdf> accessed September 1, 2011.

23 Chief Judge Johnson (n.18), [34].

24 *ibid.*, [34]. These guidelines were approved by the Court of Appeal in *R v Edwards* (2005) CA 390/05, (2005) 22 CRNZ 309, [41] <http://jdo.justice.govt.nz/jdo/GetJudgment/?judgmentID=101561> accessed September 1, 2011.

The indication will be limited to the *type* of sentence that the judge thinks appropriate, that is, imprisonment or a community-based sentence. The judge is bound by the indication unless, after it is given, fresh evidence shows that the indication is inappropriate. Should that arise, the judge must inform the defendant of the now intended type of sentence. The judge must allow the defendant to reconsider the plea and, if the defendant wishes, vacate the plea, plead not guilty and proceed to a defended hearing.[25]

It is also stipulated that where a sentence indication is accepted but sentencing is delayed and comes before another judge, that judge must follow the indication already given, or indicate the sentence he or she intends to impose and afford the defendant an opportunity to reconsider his or her position and withdraw or confirm the guilty plea. When the indication is not accepted, no record of it will be put on the file. If the defendant is later convicted of the offence, any indication given at a status hearing has no bearing on the sentence. Sentencing judges will not be told by counsel of the judge's indication and, if told, will ignore the indication.[26]

There has been judicial ambivalence about whether status hearings have been effective.[27] Statistics showed that status hearings appeared to have an *adverse* effect on a court's efficiency. While status hearings reduced the number of cases directed to be set down for a defended hearing, the net impact was negative for various reasons: status hearings increased the number of events it took to dispose of cases; status hearings lengthened the average time it took to dispose of cases; overall, status hearings did not reduce the amount of judicial time the courts needed to dispose of cases.

C. Victoria (Australia) – Statutory Sentence Indications

In Victoria, the *Criminal Procedure Act* 2009 governs the giving of sentence indications for indictable offences.[28] It is provided that at any time after the indictment is filed, the court may give a sentence indication. The indication is confined to whether the court would (or would not) be likely to impose on the accused a sentence of imprisonment that commences immediately, if the accused pleads guilty to the charge.[29] The sentence indication may be given only on the application of the accused, and such application may be made

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25 *ibid.*, [34].
26 *ibid.*, [34].
27 *ibid.,* [46]-[48].
28 *Criminal Procedure Act* 2009 (Vic.), ss.207-209 <http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/5E48BD2A65EA4DA3CA2575750009099E/$FILE/09-007a.pdf> accessed September 1, 2011.
29 *ibid.*, s.207.

only with the consent of the prosecutor. The sentence indication may be given only once during the proceeding, unless the prosecutor otherwise consents.[30] The court may refuse to give an indication, and a decision to give or not to give an indication is final and conclusive.[31]

If the court indicates that it would not be likely to impose on the accused a sentence of imprisonment that commences immediately, and the accused pleads guilty to the charge for the offence at the first available opportunity, the court is bound by that indication (that is, the court must not impose a sentence of imprisonment that commences immediately).[32] If the court gives such a sentence indication and the accused does not plead guilty to the charge for the offence at the first available opportunity, at trial the court must be constituted by a different judge, unless all the parties agree otherwise, and the sentence indication does not bind that judge.[33] An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.[34] The giving of a sentence indication does not affect any right to appeal against the sentence.[35]

D. California (U.S.A.) – Settlement Conferences for Complex Cases

In the Central District of California, provision is made under the *District Court Rules* for the involvement of settlement judges in the settlement of complex cases.[36] It is a stated policy of the court to facilitate the efforts of parties to dispose of complex criminal cases without trial. It is also the court's policy that the judge assigned to preside over a complex criminal case (the trial judge) may ask if parties desire a settlement conference, but shall not participate in facilitating settlement. Participation in settlement conferences is completely voluntary.[37]

A settlement conference can be requested by the attorney for the government and the attorney for the defendant acting jointly. A settlement conference may be requested at any time up to the settlement conference cut-off date established by the trial judge. If

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30 *ibid.*, ss.208(1), (2).
31 *ibid.*, ss.208(4), 209(4).
32 *ibid.*, s.209(1).
33 *ibid.*, ss.209(2)-(3).
34 *ibid.*, s.209(4).
35 *ibid.*, s.209(5).
36 *Federal Rules of Criminal Procedure (F.R.Crim.P.)*, r.57 (District Court Rules), Local Criminal Rules (Central District of California), L.Cr.R. 57-3 <http://www.cacd.uscourts.gov/CACD/LocRules.nsf/a224d2a6f8771599882567cc005e9d79/00df996ac9f88d5588256dc500597464?OpenDocument> accessed September 1, 2011.
37 *ibid.*, L.Cr.R. 57-3.1.

no cut-off date is established, a settlement conference request may be made at any time up to 21 days before the date scheduled for the commencement of trial, unless a later request is permitted by the trial judge. Upon a timely request for a settlement conference, the trial judge may refer the matter for assignment to a settlement judge.[38]

The role of the settlement judge is limited to facilitating a voluntary settlement between parties. The settlement judge does not preside over any aspect of the case other than facilitation of a voluntary settlement. All matters related to the case other than settlement are handled by the trial judge.[39] The defendant will not be present during settlement discussions, unless otherwise ordered by the settlement judge. The settlement conference is not to be reported. If a settlement is agreed to by both counsel and approved by the defendant, the plea agreement must be reduced to writing and executed by the parties within three court days from the settlement conference.[40]

The settlement judge does not take a guilty plea from and does not sentence any defendant in the case. The settlement judge is not to communicate any of the substance of the settlement discussions to the trial judge. No statement made by any participant at the settlement conference shall be admissible at the trial of any defendant in the case. Neither counsel shall disclose the substance of the settlement discussions or the comments and recommendations of the settlement judge to the trial judge, except as expressly provided for by the terms of the written plea agreement.[41]

E. Arizona (U.S.A.) – Settlement Conferences for Majority of Cases

The practice of settlement conferences in Arizona dates back to 1996.[42] That year, certain judges on the criminal bench of the Superior Court of Arizona in Maricopa County began to conduct settlement conferences in criminal cases with the consent of the parties. This step was taken after it was noted that many criminal cases that should have resulted in pleas were instead going to trial. In addition, there was a backlog of criminal cases awaiting trial. A petition was subsequently made by the pioneering judges to the Arizona Supreme Court for a rule formally authorising such conferences. The Arizona Supreme Court responded favourably and

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38 *ibid.*, L.Cr.R. 57-3.3.
39 *ibid.*, L.Cr.R. 57-3.4.
40 *ibid.*, L.Cr.R. 57-3.5.
41 *ibid.*, L.Cr.R. 57-3.6.
42 See Hon. Robert L. Gottsfield and Mitch Michkowski, "Settlement Conferences in Criminal Court", *Arizona Attorney* (April 2007), 8-16 <http://www.myazbar.org/AZAttorney/PDF_Articles/0407Settle.pdf> accessed September 1, 2011.

in 1997 adopted rule 17.4(a) of the Arizona *Rules of Criminal Procedure*[43] for a two-year experimental period. In 1999, the rule was adopted as a permanent procedure.

Rule 17.4(a) relates to plea negotiations. It provides that parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party or of its own accord, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor must afford the victim an opportunity to confer with the prosecutor concerning such resolution, and must inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim must also be afforded the opportunity to be present and to state his or her position with respect to such settlement. The trial judge only participates in settlement discussions with the consent of the parties. In all other cases, the discussions are to be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case is returned to the trial judge.

The settlement conference is conducted in an informal setting.[44] The settlement judge is usually not on the bench but sitting at a table with the defendant, the defendant's counsel and the prosecutor; or standing in front of the table using a flip chart, with the plea offer written on the chart. The conferences usually last 30 to 45 minutes. A court reporter is present for all discussions. The settlement judge will stress to the defendant that the purpose of a conference is not to force the defendant to enter into a plea, but to give the defendant information. The purpose of the conference is threefold: to give information to the defendant about the charges and the sentencing range of each charge should the defendant be found guilty; to advise the defendant of the evidence the state will introduce at the trial; and to examine the plea offered by the state, its pros and cons and ramifications to the defendant, contrasting it to the sentencing range of the charge if there is no plea and the defendant is found guilty. The defendant is free to ask any questions of the judge. Some judges will, if asked, give their opinion whether it is a difficult case to defend.[45]

Settlement conferences have been found beneficial in reducing the time needed to resolve cases. For example, where the defendant for

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43 <http://www.arizonacrimelaws.com/17_4.htm> accessed September 1, 2011.
44 Gottsfield, Michkowski (n.42), 10, 12.
45 *ibid.,* 12.

whatever reason does not trust the advice of his attorney when the attorney recommends acceptance of a plea agreement, it has been found useful to have the settlement judge advise the defendant of the consequences of going to trial or taking the plea. Conversely, where the plea offer is disproportionately harsh, the settlement judge can exert some influence on the prosecutor. Even if the settlement conference did not end in a plea, they have been found useful in bringing parties together early in the proceedings and enabling cases to be processed on a professional, cooperative and respectful basis.[46]

However, settlement conferences have been significantly less useful when they were set late in the proceedings, where the parties had invested significant resources in preparation for trial and the benefits were greatly diminished. Another downside to settlement conferences occurred when too many conferences were set on a court calendar, and prosecutors and defence attorneys wasted significant blocks of time waiting for their cases to be called. Another negative impact was that, because settlement conferences were so readily available, some defence attorneys relied unduly on the courts "to do their job for them". In some cases, defence attorneys requested settlement conferences merely to meet with their in-custody clients.[47]

While it was not compulsory for criminal cases in Arizona to undergo a settlement conference before trial, as at 2007 about 65 per cent of criminal cases underwent such conferences.[48] It was found that settlement rates of judges holding conferences averaged 64 to 78 per cent.

F. Some Observations

From this brief survey it is apparent that judicial involvement in the early resolution of criminal cases is not uncommon. There are potential benefits in terms of savings in time and costs of the parties. It also gives greater certainty and predictability in the final outcome, which should translate to a reduced rate of appeal. Court resources can be allocated more optimally to contentious cases where a trial cannot be avoided. But there are potential pitfalls, and the courts must guard against these. Improper pressure should not be exerted on defendants to plead guilty. The public interest (including, as the case may be, the interests of the victim) should not be compromised when pursuing an early settlement. Efficiency should not be attained at the expense of the quality of justice administered.

The jurisdictions surveyed present a variety of possible models for judicial involvement in early criminal case resolution. A common

46 *ibid.,* 13.
47 *ibid.,* 13-14.
48 *ibid.,* 14.

model is to have the settlement process conducted before a judge other than the trial judge, and to keep the settlement process separate from the trial process. Less commonly, the settlement process may take place before the trial judge with the consent of the parties. A common feature in the various models is the empowering of the facilitating judge to give some form of sentence indication. The types of sentence indication permitted vary across the jurisdictions, and may be based on judicial practice or on statute. Should the defendant decide to plead guilty, most models envisage the facilitating judge taking the plea and passing a sentence according to the indication given. Should the plea be taken before another judge, the indication remains binding on the sentencing judge. A sentence indication becomes invalid if the case proceeds to trial or additional facts are presented which have a material effect on the sentence.

III. CRIMINAL CASE RESOLUTION (CCR) IN THE SINGAPORE SUBORDINATE COURTS

A. Pre-CCR Processes

In Singapore, early criminal case resolution efforts generally begin with an informal plea negotiation process between the prosecution and the defence under a programme known as the Criminal Case Management Scheme ("CCMS"). The CCMS provides a platform for prosecutors and defence counsel to engage in a frank and open discussion of the case, assess the evidence on hand, narrow down the issues, and negotiate offers relating to the type and number of charges and the sentence.

Cases that remain unresolved at these early stages proceed to pre-trial conference ("PTC"). Pre-trial conferences are held in a dedicated case management court known as the "centralised PTC court". The centralised PTC court receives updates from parties about the status of the case, tracks the progress and provides a platform for parties to discuss how the case should proceed further. Generally, several pre-trial conferences are held for each case, and a substantial number of cases are resolved at the pre-trial conference stage. Unresolved cases are fixed for trial.

In January 2011, a formal criminal discovery process was introduced in Singapore, under the new *Criminal Procedure Code* 2010,[49] known as the "criminal case disclosure conference".[50] The process applies to specific types of offences, and prescribes timelines within

[49] This new Code came into operation on January 2, 2011. For the text of the Code, see Attorney-General's Chambers, *Singapore Statutes Online* <http://statutes.agc.gov.sg/> accessed September 1, 2011.

[50] *ibid.*, Pt IX, ss.157-171 <http://goo.gl/3yc6B> accessed September 1, 2011.

which the prosecution and defence are obliged formally to disclose information about their case to the other party. It is not a compulsory process, and the defendant may choose to opt out of the process. Disclosure conferences are currently undertaken before the centralised PTC court, and the open disclosure process has contributed to the early resolution of criminal cases.

B. Referral of Unresolved Cases for CCR

For cases that remain unresolved, the centralised PTC court may, at the request of parties or of its own volition, refer suitable cases for CCR.[51] As the process of CCR is entirely voluntary, a referral would not be made without the agreement of both the prosecution and the defence. A referral would also generally not be made unless the parties have entered into discussions under the CCMS process (mentioned above).[52]

CCR will be held only for cases that are expected to require at least two days of trial, *and* that have a reasonable prospect of early resolution.[53] Priority is given to cases that have been in the court system for a fairly long time (*i.e.* more than three months), and which may have undergone a number of pre-trial conferences or criminal case disclosure conferences.

CCR is conducted only *after* trial dates have been assigned. Experience has shown that parties preparing for trial are more likely to give detailed consideration to the strengths and weaknesses of their case, and hence come more prepared for CCR. Trial dates are typically available within four weeks from the date of the last pre-trial conference or criminal case disclosure conference. But where a case is to be referred for CCR, the trial is generally fixed about seven or eight weeks after, and the CCR about three to four weeks after, the last pre-trial conference or criminal case disclosure conference. While engaging in CCR, the parties are free to conduct further discussions under the CCMS process. The prosecution may review the case and conduct further investigations, and the defence may make further representations to the prosecution as part of the plea negotiation process – but the trial dates stand.

That said, requests for CCR to be conducted *before* trial dates are assigned may be considered in appropriate cases, where there is a

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[51] The CCR process was formally implemented on October 10, 2011: see *Registrar's Circular No. 4 of 2011, "Criminal Case Resolution (CCR)"* (October 3, 2011) <http://app.subcourts.gov.sg/Data/Files/File/RegistrarCirculars/RC4Of2011.pdf> accessed October 23, 2011. This circular sets out the broad principles applicable to CCR.

[52] *ibid.*, [4].

[53] *ibid.*, [3].

reasonable prospect of such cases being resolved further upstream in the case management process.

C. Facilitation by CCR Judge

CCR sessions have thus far been facilitated by the Chief District Judge and the Senior District Judge of the Criminal Justice Division. When the CCR programme is extended and fully implemented, it is envisaged that such sessions may be facilitated by other senior district judges,[54] with a minimum of 10 years' experience on the criminal bench.

CCR sessions are held in the chambers of the facilitating judge (the CCR judge).[55] Present at each CCR session are the facilitating judge, the prosecutor and the defence counsel. The proceedings are conducted in private and are not reported, and are intended to encourage an open and frank discussion of the issues on a *without prejudice* basis and "off the record".

A CCR session will typically last for about half an hour. The number of sessions required in each case is left to the discretion of the facilitating judge, and will depend primarily on the complexity of the case. Typically, not more than two CCR sessions will be conducted per case.[56]

The role of the facilitating judge is *facilitative* and non-evaluative.[57] The judge encourages, but will not direct, parties to make disclosure and have an open discussion. The judge takes a wholly neutral and impartial stance and will not "enter the arena" by giving any definitive opinion or indicative assessment of the relative merits of the case. Nor will the judge apply pressure on the prosecution or the defence to take any particular position. The judge may, however, make general, open-ended observations or comments, and invite parties to consider the significance of particular aspects of the evidence or the legal issues. For example, in a road traffic case where the defendant is charged with causing death by rash driving, the judge might ask questions relating to who had the right of way, the road conditions, the condition of the defendant, the significance of the fact that the defendant had driven against the flow of traffic; but the judge would not give an assessment, for example, that on the evidence the prosecution had a strong case and the defendant would be hard put to defend the charge. Care is taken by the facilitating judge to ensure that the defendant comes under no pressure to take any particular course of action.

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54 *ibid.*, [5].
55 *ibid.*, [5].
56 *ibid.*, [5].
57 *ibid.*, [6].

D. Sentence Indications

The facilitating judge may consider giving a sentence indication in an appropriate case.[58] However, a sentence indication will not be given proactively, and will be considered only if an indication is sought by the defence. In every case, the facilitating judge retains the discretion whether or not to give a sentence indication.

Sentence indications may include one or more of the following: (a) the type of sentence (custodial, non-custodial, community sentence, *etc.*); (b) the likely maximum sentence (*e.g.* length of prison term or community sentence, or quantum of fine); and (c) the range of sentence (*i.e.* the likely minimum and maximum sentence).

A sentence indication will not be given unless sufficient information has been provided to the facilitating judge to enable a proper assessment to be made.[59] Such information includes the charges, the written summary of facts of the prosecution, the defendant's antecedent records, and the defendant's mitigation plea. The parties may be invited to give their views prior to a sentence indication being given. Sentence indications are unlikely to be given except in cases where the sentence type or the range of sentence is clear from established sentencing precedents.

Sentence indications are considered only on the assumption that the defendant will plead guilty. No indication is given of the sentence that the defendant is likely to face on a conviction *after trial*. A sentence indication therefore becomes invalid if the defendant does not plead guilty and is subsequently convicted after a trial.

E. Post-CCR Processes

If the defendant decides to plead guilty in the course of CCR, the CCR judge may, with the parties' consent, proceed to take the plea and pass sentence.[60] The sentence will be in line with the prior sentence indication given, if any. Should the plea be taken before another judge, that judge is expected to follow the sentence indication given at CCR.

Where, subsequent to the sentence indication being given, new material facts are brought to the attention of the judge taking the plea (whether the CCR judge or another judge), the prior sentence indication becomes invalid. In such a case, the judge will inform the defendant that the sentence indication may not be followed, and will give the defendant an opportunity to reconsider whether to maintain

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58 *ibid.*, [7].
59 *ibid.*, [7].
60 *ibid.*, [8].

the plea of guilt. The judge may also consider giving a new sentence indication in light of the new facts.[61]

The statutory right of appeal is preserved, and the sentencing of a defendant in accordance with a sentence indication does not preclude an appeal against the sentence, either by the prosecution or the defence.

Where a case remains unresolved after CCR and proceeds to trial, the trial will be conducted before another judge. Any notes taken by the CCR judge will not be included in the case file, and the trial judge may not see them. All CCR discussions are confidential, and nothing said by any party in the course of CCR may be tendered in evidence at the trial, nor may the trial judge be apprised of any matter discussed at the CCR.[62]

IV. CONCLUSION: NEXT STEPS

CCR has provided an important platform for the prosecution and defence to come together to discuss criminal cases in an open manner, and to explore options to resolve them without a trial. It should be noted that, while CCR seeks to reduce the incidence of cracked trials via a judge-facilitated mediation process, its aim is *not* to reduce the number of trials by actively encouraging pleas of guilt. It is recognised that not all cases are amenable to an early resolution, and some cases must be resolved at trial. Nevertheless, CCR has been found valuable in helping parties to narrow down the issues at trial by exchanging relevant information and documents, thus ensuring a more efficient trial and a better use of court time.[63]

The CCR pilot programme has shown very encouraging results. There have been clear benefits in terms of hearing dates saved and the re-allocation of resources. As at August 2011, 60 cases have undergone CCR, resulting in savings of about 104 hearing days. For cases resolved by pleas of guilt after CCR, there have been no appeals against the sentences imposed (except in one case where the plea and sentence was before another judge, not the CCR judge). The process has been beneficial to the prosecution and the defendants concerned.

Currently, CCR is conducted only in cases where the defendant is represented by defence counsel.[64] Consideration is being given to the possibility of extending CCR to unrepresented defendants, with appropriate safeguards to minimise any allegation or misperception of the defendant being coerced to plead guilty. Consideration is also being given to an inclusive CCR model, where CCR becomes an

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61 *ibid.*, [9].
62 *ibid.*, [10].
63 *ibid.*, [2].
64 *ibid.*, [3].

integral component of the case management process through which all cases flow, subject to an opt-out mechanism for parties that might prefer not to undergo CCR for any reason. A legislative framework to formalise the CCR process is also being considered.

In extending the scope of CCR to include more cases, the continuing challenge will be to build and maintain public trust and confidence in the integrity of the process. There is reason to be optimistic that the institution of CCR as an integral part of the Singaporean case management process will help, in the long term, in the optimal utilisation of judicial resources by facilitating the early resolution of cases, and by reducing the incidence of cracked trials.

"LESSONS FROM DOWN UNDER": THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE IN NEW ZEALAND AS THE MODEL FOR A CHANGING UNITED STATES EXCLUSIONARY RULE

*SCOTT OPTICAN**

ABSTRACT

In criminal proceedings, the legal systems of New Zealand and the United States have each faced the problem of how to treat evidence improperly obtained by the police. This article explores the similarities and differences between American and New Zealand jurisprudence as it deals with the judicial decision to admit or exclude improperly obtained evidence in criminal proceedings. It suggests that the current approach in the United States – a more static exclusion regime focused on fixed cost-benefit determinations with respect to deterring future police breaches of law – may move in the direction of the existing New Zealand model: an approach to exclusion based on a broad view of the interests of justice and a multi-factored proportionality-balancing test. While not purporting to assess the "right" or "better" approach to exclusion, this article offers "lessons from down under" with respect to adopting a "Kiwi" (New Zealand) approach to exclusion in the United States.

I. INTRODUCTION

The American "exclusionary rule" requires judges to exclude from criminal trials evidence obtained by the police in violation of the *Fourth Amendment to the United States Constitution*. However, recent trends in United States' case law may be seen as shifting the rule towards the sort of "balancing" regime applied by New Zealand's courts – albeit one now focused on fewer factors than the current "Kiwi" approach.

This article examines how the law of criminal procedure in both countries deals with evidence improperly obtained by the police. It does not offer a comprehensive analysis of the exclusionary rules of America or New Zealand; nor does it attempt to determine which jurisdiction has the more "sound" approach to exclusion – an exercise fraught with the kind of subjective jurisprudential judgments best avoided in comparative legal analysis. Rather, it examines whether a full blown New Zealand style balancing model might be something that could eventually recommend itself to United States

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judges or lawmakers – just as it did in New Zealand following years of an "all or nothing" approach to exclusion – and, if so, what lessons could be learned from New Zealand with respect to adopting and implementing such a regime.

II. The Exclusion of Improperly Obtained Evidence in the United States and New Zealand

A. The United States

Jurisprudentially grounded in the deterrence of police misconduct, and subject to certain exceptions grouped around lack of causality and police good faith, the American exclusionary rule has tended to operate routinely once courts determined that evidence had been obtained – either directly or through some derivative chain of causation – in an "unreasonable" search and seizure forbidden by the *Fourth Amendment to the United States Constitution*.[1]

However, the rule itself is not constitutionally based. As far back as the 1970s, the United States Supreme Court made it clear that exclusion is "a judicially created remedy designed to safeguard *Fourth Amendment* rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved".[2] This approach separates breaches of rights from their remedies and assigns a specific aim – discouraging police misconduct – to the judicial decision to exclude. As signalled in the most recent cases from the Supreme Court, such orientation also appears to be driving new and potentially significant changes to the American exclusionary rule.

For example, in the 2006 decision of *Hudson v. Michigan*, Scalia J. wrote that the court had always eschewed "indiscriminate application of the rule", observing that "[w]hether the exclusionary sanction is appropriately imposed in a particular case, … is an issue separate from the question whether the *Fourth Amendment* rights of the party seeking to invoke the rule were violated by police conduct".[3] Likewise, in the 2009 case of *Herring v. United States*, the court "rejected the argument that exclusion is a necessary consequence of a *Fourth Amendment* violation" – observing that the rule should apply

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1 Joshua Dressler and Alan Michaels, *Understanding Criminal Procedure* (5th edn, LexisNexis 2010), vol. 1, "Investigation", 347. The text of the *Fourth Amendment* reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2 *U.S. v. Calandra*, 414 U.S. 338 (1974), 348.

3 547 U.S. 586 (2006), 591 (internal quotations omitted).

only where it "results in appreciable deterrence" of police misconduct.[4] Indeed, *Herring* went even further, holding:

> "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[5]

That price, Roberts C.J. wrote, "is, of course, letting guilty and possibly dangerous defendants go free – something that 'offends basic concepts of the criminal justice system'".[6]

The cost-benefit orientation of *Herring* was affirmed and strengthened in the most recent (June 2011) *Fourth Amendment* decision from the court, *viz. Davis v. United States*.[7] Writing for the 7-2 majority, Alito J. stated:

> "The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future *Fourth Amendment* violations … . Our cases have thus limited the rule's operation to situations in which this purpose is thought must efficaciously served … . Where suppression fails to yield appreciable deterrence, exclusion is clearly … unwarranted.
>
> Real deterrent value is a necessary condition for exclusion but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large … It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence … And its bottom line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment … . Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort … . For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs."[8]

Davis likewise reiterates the key conclusion of *Herring*, *viz.* "the deterrence benefits of exclusion [will] 'var[y] with the culpability of the law enforcement conduct at issue'" in a particular case.[9] Accordingly, both decisions currently reserve the *Fourth Amendment* exclusionary rule for those circumstances where "the deterrent effect of suppression [will] be substantial and outweigh any harm to the justice system".[10] As *Davis* explains:

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4 555 U.S. 135 (2009), 141 (quoting *U.S. v. Janis*, 428 U.S. 433 (1976), 454).
5 *ibid.*, 144.
6 *ibid.*, 141 (quoting *U.S. v. Leon*, 468 U.S. 897 (1984), 908).
7 131 S.Ct. 2419 (2011).
8 *ibid.*, 2426-2427 (internal quotations omitted).
9 *ibid.*, 2427 (quoting *Herring* (n.4), 143).
10 *Herring* (n.4), 147.

> "When the police exhibit deliberate, reckless or grossly negligent disregard for *Fourth Amendment* rights, the deterrent value of exclusion is strong and tends to outweigh the resulting social costs."[11]

Herring suggests a similar result where *Fourth Amendment* errors result from "recurring or systemic negligence" on the part of law enforcement officers.[12] By way of contrast, *Davis* notes that "when the police act with an objectively reasonable good faith belief that their conduct is lawful, … or when their conduct involves only simple, isolated negligence, … the deterrence rationale loses much of its force, and exclusion cannot pay its way".[13] In such cases, observed Roberts C.J. in *Herring*, "the criminal should not 'go free because the constable has blundered'".[14]

Academic discussion in the United States, much of it disapproving, has been divided on the implications of *Hudson*, *Herring* and *Davis* for the prospects of the *Fourth Amendment* exclusionary rule.[15] Some commentators see the decisions as confined to their facts, or as merely extending existing exceptions to the rule that, as previously noted, are generally based around concepts of causal attenuation and police good faith.[16] Others see the potential for a broader and more sustained assault on *Fourth Amendment* exclusion, an outlook that envisages either: (a) the eventual abolition of the

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11 *Davis* (n.7), 2427.

12 *Herring* (n.4), 144.

13 *Davis* (n.7), 2427-2428 (internal quotations omitted).

14 *Herring* (n.4), 148 (citing *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the court by Cardozo J.)).

15 See for example, James Tomkovicz, "*Hudson v. Michigan* and the Future of *Fourth Amendment* Exclusion" (2008) 93 Iowa Law Review 1819; Wayne LaFave, "The Smell of *Herring*: A Critique of The Supreme Court's Latest Assault on the Exclusionary Rule" (2009) 99 The Journal of Criminal Law and Criminology 757; Adam Liptak, "Justices Step Closer to Repeal of Evidence Ruling" *New York Times* (New York, January 31, 2009) <http://www.nytimes.com/2009/01/31/washington/31scotus.html?_r=1&partner=permalink&exprod=permalink&pagewanted=all> accessed August 4, 2011; Orin Kerr, "Responding to Tom Goldstein on *Herring*" (*The Volokh Conspiracy*, January 14, 2009) <http://volokh.com/archives/archive_2009_01_11-2009_01_17.shtml#1231961926> accessed August 4, 2011; Erwin Chemerinsky, "Moving to the Right, Perhaps Sharply to the Right" (2009) 12 Green Bag 413, 416 <http://www.greenbag.org/v12n4/v12n4_chemerinsky.pdf> accessed August 4, 2011; Orin Kerr, "Good Faith, New Law, and the Scope of the Exclusionary Rule" (2011) 99 The Georgetown Law Journal 1077; Ross Oklewicz, "Expanding the Scope of the Good-Faith Exception to the Exclusionary Rule to Include a Law Enforcement Officer's Reasonable Reliance on Well-Settled Case Law that is Subsequently Overruled" (2010) American University Law Review 1715; Jeff Welty, "*Davis v. United States* and the Future of the Exclusionary Rule", The University of North Carolina School of Government Blog, June 21, 2011 <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2586> accessed August 4, 2011.

16 See the text at n.1.

exclusionary rule; or (b) its application to such a narrow class of cases (deliberate, reckless or grossly negligent police conduct, or in some circumstances recurring or systemic negligence) that the rule "may prove to be dead, as a practical matter".[17] However, at a minimum, one can agree with Dressler and Michaels' succinct forecast for this area of American criminal procedure law:

> "[I]f the exclusionary rule is *not* constitutionally commanded by the Constitution – if it is merely a 'prudential' rule devised by the Supreme Court, then what the court 'giveth' it can 'taketh' away or, at the very minimum, narrow dramatically … .
>
> And if the only basis for the exclusionary rule is an empirical claim that it deters official misconduct, then the justices have the authority to abolish the exclusionary rule if and when they determine it lacks sufficient deterrent bite to outweigh its costs (loss of reliable evidence at trial)."[18]

Only time, and future United States Supreme Court decisions, can determine whether and in what form *Fourth Amendment* exclusion will survive under American constitutional jurisprudence. Until then, arguments over application of the exclusionary rule will take place in lower court judgments, and discussions about the rule will carry on in American law schools and law reviews. The United States Congress may even get involved, reviving past efforts by legislators, through codification, to restrict the reach of a contentious common law remedy that is not constitutionally required to deal with the evidential fruits of police conduct forbidden by the *Fourth Amendment*.[19]

B. New Zealand

Prior to enactment of the non-entrenched *New Zealand Bill of Rights Act* 1990 (the "*Bill of Rights*" or the "Bill"), New Zealand judges retained a common law power to exclude evidence on the grounds of unfairness – a somewhat murky jurisdiction pegged to various instances (but not every instance) of police misconduct leading to real or confessional evidence in a criminal case. However, following passage of the *Bill of Rights*, the New Zealand Court of Appeal quickly fashioned a "*prima facie* rule of exclusion" for evidence obtained in violation of the Bill's multiple provisions controlling police search

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17 Dressler, Michaels (n.1), 382.

18 *ibid.*, 353.

19 See Emily Barbour, "*Davis v. United States*: Retroactivity and the Good-Faith Exception to the Exclusionary Rule" (Congressional Research Service report R41774, April 19, 2011) <http://www.fas.org/sgp/crs/misc/R41774.pdf> accessed August 8, 2011.

and seizure and the investigative handling and questioning of criminal suspects.[20]

The *prima facie* exclusionary rule – which was jurisprudentially grounded in the imperative to vindicate rights rather than to deter police misconduct – existed at common law from 1992 until 2002.[21] Somewhat misnamed, the rule tended to lead automatically and inevitably to the exclusion of real or confessional evidence once a New Zealand judge determined that police had improperly obtained such proof.[22] Indeed, growing judicial dissatisfaction with the inflexible nature of this remedy, coupled with a belief that the vindication of rights did not always justify the costs of exclusion to the criminal prosecution process, caused the Court of Appeal to revamp its jurisdiction in the 2002 decision of *R. v. Shaheed*.[23]

Shaheed substituted for the *prima facie* rule a "proportionality-balancing test" that created no presumption of admissibility or inadmissibility for evidence obtained in violation of the *Bill of Rights*. Focused on a broad-based notion of the overall interests of justice in a criminal proceeding, the proportionality-balancing test instead asked trial judges to balance a number of different factors to determine whether exclusion was or was not a proportionate, remedial response to the police breach of the Bill at issue in any given case. While the Court of Appeal instructed lower courts to give appropriate and significant weight to the facts and circumstances of the police transgression, it likewise charged them with considering the public interest in law enforcement and the need to maintain an effective and credible system of justice. Various considerations formed part of the calculus, but "the principal balancing act of *Shaheed* [pitted] the seriousness of the breach of the [*Bill of Rights*] and the blameworthiness of police misconduct against the gravity of the offence(s) charged and the centrality of the evidence to the prosecution" case.[24]

Unlike the *prima facie* exclusionary rule, *Shaheed*'s proportionality-balancing test permitted judges to admit evidence in a criminal trial despite a police transgression of the *Bill of Rights* leading to real or confessional proof. The test operated as the common law remedy for improperly obtained evidence in New Zealand until August 1,

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[20] See *R. v. Butcher* [1992] 2 N.Z.L.R. 257 (Court of Appeal).

[21] Scott Optican, Peter Sankoff, "The New Exclusionary Rule: A Preliminary Assessment of *R. v. Shaheed*" [2003] New Zealand Law Review 1, 3.

[22] Scott Optican, "Front-End/ Back-End Adjudication (Rights Versus Remedies) Under Section 21 of the *New Zealand Bill of Rights Act* 1990" [2008] New Zealand Law Review 409, 412.

[23] [2002] 2 N.Z.L.R. 377.

[24] Scott Optican, "The New Exclusionary Rule: Interpretation and Application of *R. v. Shaheed*" [2004] New Zealand Law Review 451, 527.

2007. At that time, section 30 of the newly minted *Evidence Act* 2006 (the "*Evidence Act*") came into force. In criminal proceedings, section 30 essentially incorporated *Shaheed* into New Zealand's first codified rule of general exclusion for evidence improperly obtained by the police (or other state actors).

How does section 30 operate? As defined in section 30(5), "improperly obtained" evidence means real or confessional proof obtained:

a) "in consequence of" a breach of the *Bill of Rights* or any other rule of law by the police or other state actors – whether directly or through some derivative chain of causation; or
b) "unfairly" – a term that case law effectively limits to the assessment of police practices attending the investigative questioning of criminal suspects, and whose application is currently guided by a *Practice Note on Police Questioning* issued by the Chief Justice on July 16, 2007, pursuant to section 30(6) (the "*Practice Note*").

While bringing all type and manner of improperly obtained evidence within its purview, section 30, following *Shaheed*, creates no presumption of admissibility or inadmissibility for such material. Instead, section 30(2)(b) requires judges to determine whether the exclusion of real or confessional proof from a criminal proceeding would be "proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice".

In ascertaining whether exclusion is a proportionate, remedial response to the police misconduct in the case, section 30(3) lists a number of non-exclusive factors to be considered in the section 30(2)(b) balance. Like determinations under *Shaheed*, case law makes clear that chief among these are:[25]

a) the nature and seriousness of the impropriety (typically a breach of the *Bill of Rights* or the *Practice Note*) and, in particular, whether it was committed deliberately, recklessly, or in bad faith by the police (s.30(3)(a)-(b));
b) the nature and quality of the improperly obtained evidence (which includes its importance to and centrality in the prosecution case) (s.30(3)(c)); and
c) the seriousness of the offence with which the defendant has been charged (s.30(3)(d)).

Other, generally less significant, factors include:

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[25] Scott Optican, Peter Sankoff, *Evidence Act Revisited for Criminal Lawyers* (New Zealand Law Society 2010), 152-154.

a) alternative remedies to exclusion of the evidence that could provide adequate redress to the defendant (s.30(3)(f));
b) whether, at the time of the impropriety, the police knew about but failed to use any other lawful and available investigatory techniques (s.30(3)(e));
c) whether the impropriety was necessary to avoid "apprehended physical danger to the police or others" (s.30(3)(g)); and
d) whether there was any perceived "urgency" for police to obtain the improperly obtained evidence (s.30(3)(h)).

To date, the application of section 30 has been principally guided by the 2007 New Zealand Court of Appeal decision in *R. v. Williams*.[26] A lengthy judgment dealing with real evidence obtained by police in violation of section 21 of the *Bill of Rights* – which requires any investigative "search" or "seizure" undertaken by law enforcement to be reasonable – *Williams* sought to lay down a structured approach to the section 30 exercise designed to guide and rationalise the judicial power to exclude.

Williams first explained the causal connection that section 30(5) requires before police misconduct will be recognised as having produced "improperly obtained" evidence.[27] The decision then went on to clarify "the meaning and interpretation of the factors relevant to the proportionality-balancing test; how judges should systematically consider and balance the factors against one another to reach a result; and the expected outcomes of proportionality-balancing under section 30 given the various kinds of police improprieties generating evidence in a criminal case".[28]

What is the methodology of *Williams*? In applying section 30 to evidence improperly obtained by the police, *Williams* first requires judges to assess the seriousness of the impropriety that produced the challenged evidence. This is a determination that, pursuant to the section 30 factors elaborated above, points in favour of exclusion and incorporates:[29]

a) the nature and extent of the police illegality, breach of the *Bill of Rights* and/or unfairness generating improperly obtained evidence (including, where section 21 of the *Bill of Rights* is at

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[26] [2007] NZCA 52, [2007] 3 N.Z.L.R. 207. For a discussion and critique of recent case law applications of *Williams* in New Zealand trial and appellate courts, see Scott Optican, "R. *v. Williams* and the Exclusionary Rule: Continuing issues in the Application and Interpretation of Section 30 of the *Evidence Act* 2006" [2011] New Zealand Law Review 507.

[27] *ibid.,* [241]-[244].

[28] Scott Optican "Criminal Procedure" in J. Tolmie and W. Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis 2007), 179.

[29] *Williams* (n.26), [245]-[249] (emphasis added).

issue, an assessment of the strength of the privacy interest violated by the police misconduct in the case);

b) the characterisation of police misconduct and whether the police acted deliberately, recklessly, carelessly, or in bad faith; and

c) any other mitigating or aggravating factors attending the circumstances in which the evidence was improperly obtained – including: (i) the known availability of alternative and lawful investigative techniques; (ii) the strength or weakness of the causal connection between the police impropriety and the obtaining of the challenged evidence (which encompasses whether the improperly obtained evidence would inevitably have been discovered by lawful investigative means); (iii) in the case of real evidence, the strength or weakness of any connection between the defendant and the place searched or property seized (the issue of standing); and (iv) whether the police investigation took place in a situation of urgency or emergency – a consideration that looks to apprehended danger to the police or others and, in some circumstances, to the steps necessary to avoid the loss or destruction of evidence central to a criminal case.

Having considered and combined the factors above to reach an overall conclusion on the seriousness of the police impropriety at issue in the proceeding, *Williams* then requires judges to balance that overall assessment against "public interest factors pointing away from the exclusion of evidence".[30] Like those related to the seriousness of police misconduct, these matters must be "considered in combination and not in isolation".[31] The two principal public interest factors are:

a) the seriousness of the crime – with offences being considered serious based on various relevant circumstances, such as: (i) the length of any likely term of imprisonment upon conviction; and (ii) whether the offence carries with it some element of a "threat to public safety";[32] and

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30 *ibid.*, [250].

31 *ibid.*

32 *ibid.* See also *R. v. Yeh* [2007] NZCA 580, [55]. In *Hamed v. The Queen* [2011] NZSC 101, several justices of the New Zealand Supreme Court expressed the view that the maximum term of imprisonment allowed by Parliament for a charged crime should also impact a judge's perception of offence seriousness for the purposes of applying section 30(3)(d): [197] (Blanchard J.), [239] (Tipping J.). Some justices in *Hamed* also noted their assessment that, with respect to the section 30 proportionality-balancing exercise and depending on the circumstances of the case, the fact that a defendant is facing a serious charge could counsel either in favour of or against excluding improperly obtained evidence in a criminal trial: [65] (Elias C.J.), [230] (Tipping J.). The reason, according to Tipping J., is that "'while the public has

b) the nature and quality of the evidence – which includes an assessment of its probative value, reliability and centrality to the prosecution case.

With both halves of the section 30 equation articulated in this manner – and as required by section 30(2)(b)– judges must then weigh the relevant factors and balance the competing interests to determine whether exclusion of the improperly obtained evidence would or would not be a proportionate, remedial response to the police breach of law that generated such proof in a particular proceeding. However, *Williams* observed that, while the exclusion of evidence under the section 30 proportionality-balancing test must be "tailored to the circumstances of each case", a finding of serious illegality, untempered by any relevant mitigating circumstances, would "normally" lead to exclusion, "even where the crime was serious" – a result described by the court as "almost inevitable" where the police impropriety at issue was "deliberate, reckless or grossly careless".[33] However, Glazebook J. carefully added:

> "We say almost inevitable because we cannot rule out a possibility that, even in such cases, where the evidence is reliable, highly probative and crucial to the Crown case, the public interest may be seen to outweigh the breach in cases involving very serious crimes and especially those involving major danger to public safety, such as a possible serial rapist or murderer or a major drugs offender."[34]

III. LESSONS FROM DOWN UNDER

As the preceding summaries should suggest, New Zealand jurists will find something familiar about the current perspectives on exclusion seen in United States Supreme Court decision-making (and critiqued in recent American legal academic writing). Indeed, as might eventually be the case in the United States, the New Zealand exclusionary rule has undergone a significant and particular transformation in recent years.

Such change, described above, saw New Zealand common law move from: (a) a relatively vague and unfettered judicial power to exclude evidence on the grounds of unfairness; to (b) a firm norm of exclusion (the traditional American type) for police transgressions of the *Bill of Rights*. However, in reaction to the perceived inflexibility

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a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high"': *ibid.*, quoting *R. v. Grant* [2009] 2 S.C.R. 353, [84] (Supreme Court of Canada).

33 *ibid.*, [251]-[252].

34 *ibid.,* [146].

and social costs of such an automatically applied rule – a view manifest in the most recent decisions of the United States Supreme Court – the New Zealand Court of Appeal reshaped its remedial jurisdiction in favour of the multi-factored, "balancing" test recently codified by Parliament in section 30 of the *Evidence Act*.

Akin to the current American approach – which now looks for situations where the benefits of exclusion for the deterrence of police misconduct is worth the price of losing reliable evidence in a criminal trial – the section 30 proportionality-balancing rule essentially gauges whether, in any particular set of circumstances, the exclusion or admission of evidence will be most consistent with the overall interests of justice. In doing so, the New Zealand decision matrix, as set out in *Williams*, uses a broad-based analysis grounded in the considerations codified under section 30(3).

As with the United States law on evidence obtained in breach of the *Fourth Amendment*, exclusion in New Zealand will be most likely when the deliberate, reckless or grossly negligent nature of police misconduct suggests that the goal to be accomplished by the section 30 exclusionary rule is worth the costs to the prosecution process of barring cogent evidence from a criminal trial. Pursuant to *Williams*, that goal is principally, but not exclusively, the vindication of individual rights (a point discussed further in Pt III(B), *post*).[35] By contrast, the aim of exclusion in America still focuses on deterring future police breaches of the United States *Bill of Rights*. Regardless, both countries are engaged in a similar jurisprudential exercise: deciding when the recognised policy objectives served by the admission or exclusion of improperly obtained evidence can justify a given decision in light of particular constellations of fact.

What, then, might be the lessons from the New Zealand experience for the future of the United States exclusionary rule? The similarities described above exist, of course, at a certain level of analytic generality. Many differences remain in the historical and current approaches to the treatment of improperly obtained evidence seen in the two jurisdictions. There are also differences in each country's legal and constitutional traditions, including diverse perspectives on: (a) the control of police investigative powers (a point evidenced by comparing various legislative enactments in both nations as well as judicial determinations under their respective *Bills of Rights*); and (b) the appropriate roles of courts versus legislators in managing law enforcement conduct and defending individual liberties.

Nonetheless, if the jurisprudential history underlying section 30 is any guide, the present trajectory of the American exclusionary rule

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35 *Williams* (n.26), [124] (emphasis added).

may see it headed towards something like the current approach practised in New Zealand: a full-blown proportionality-balancing test – with no presumption of inclusion or exclusion for evidence obtained by police in violation of United States law – that is (a) applied on a case-by-case basis, (b) grounded in various enumerated factors, considerations and policies that American jurisprudence accepts as relevant to the judicial power to exclude, and (c) aimed at assessing the *pros* and *cons* (costs and benefits) of exclusion or admission for the overall interests of justice in each particular set of circumstances. Indeed, American lawmakers might view a New Zealand-style test as an attractive "halfway house" between outright abolition of the current *Fourth Amendment* exclusionary rule and its still widespread application in most circumstances of police investigative misconduct. If such evolution does occur, the "Kiwi" experience could offer various lessons to the United States on matters likely to arise under a "balancing" form of exclusion law.

This part lays out four key areas in which a new United States' approach to exclusion might draw on New Zealand's experience. First, how feasible is a novel American exclusionary rule based on a "Kiwi"-style balancing approach, and what could or would be its scope? Secondly, what aims might such a broader balancing test for exclusion pursue? Specifically, would the focus of a new American exclusionary rule be widened simply from deterring police misconduct to a more expansive conception of the interests of justice? Thirdly, how might United States law both elaborate and manage, under a "Kiwi"-style regime, the factors relevant to the judicial decision to exclude? Fourthly, and following on from the previous question, what are the consequences of a shift towards full-blown balancing for the current "gatekeeper" roles played by the doctrines of standing and causation in American exclusion law? In these four areas, United States' policymakers, judges and academics may do well to think about and draw on "lessons from down under".

A. Feasibility and scope of a new exclusionary rule

American judges and academics generally refer to the exclusionary rule as applying to real (physical) evidence seized in violation of the reasonable search and seizure requirements of the *Fourth Amendment to the United States Constitution*. However, the rule also encompasses evidence obtained pursuant to unlawful arrests and detentions – police activity conceptualised as a "seizure" of the person triggering *Fourth Amendment* scrutiny.[36]

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[36] Dressler, Michaels (n.1), 141.

By contrast with the *Fourth Amendment* exclusionary rule, the proportionality-balancing test codified in section 30 of the New Zealand *Evidence Act* has a broader scope. Section 30 applies to real evidence obtained in breach of any relevant provision of the *New Zealand Bill of Rights* or discrete legislative enactments controlling police investigative conduct. Likewise, section 30 extends to confessional evidence secured in violation of the *Bill of Rights* or the interrogation rules specified in the *Practice Note* promulgated under section 30(6). Such transgressions typically involve police questioning in situations of improper detention, or conducted in violation of a detainee's rights to counsel or silence as set out in the *Practice Note* and section 23 of the *Bill of Rights*.[37]

As noted above, United States law extends the *Fourth Amendment* exclusionary rule to the evidential fruits of unlawful arrests and detentions – material that can include both real and confessional proof obtained from suspects during any period of illegal police custody.[38] However, a separate exclusion regime deals with statements obtained in violation of rules controlling the questioning of criminal suspects lawfully arrested by the police. These rules derive from the protection against self-incrimination contained in the *Fifth Amendment to the United States Constitution*, and comprise the famous caution – encompassing various aspects of the rights to silence and counsel – set out by the American Supreme Court in the 1966 decision of *Miranda v. Arizona*.[39]

As with evidence obtained in violation of the Fourth Amendment, confessional statements secured by police in direct violation of an individual's *Miranda* rights are subject to exclusion at trial. However, like the *Fourth Amendment* exclusionary rule, there are certain exceptions to inadmissibility for police transgressions of *Miranda*, as well as particular principles for dealing with evidence derived from *Miranda* violations through a chain of connection to the original breach.[40] United States Supreme Court decisions also recognise an exclusionary rule for: (a) statements obtained through police interrogations violating the *Sixth Amendment* right to counsel[41] (which attaches once adversarial criminal proceedings have been initiated against a criminal suspect); and (b) custodial police questioning in breach of federal codes requiring arrestees to be brought before a magistrate "without unnecessary delay".[42] Statements intercepted by

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37 Optican (n.24), 493-506.

38 Dressler, Michaels (n.1), 368-369.

39 384 U.S. 436 (1966).

40 Dressler, Michaels (n.1), 450, 486-498.

41 *ibid*., 521-526.

42 Fed. R. Crim. P. 5(a)(1)(A). See *McNabb v. U.S*., 318 U.S. 332 (1943); *Mallory v. U.S*., 354 U.S. 449(1957). See also the discussion of the *McNabb-Mallory* rule and

police electronic surveillance in violation of federal wiretapping statutes may also be excluded pursuant to legislated remedies – cures that are themselves subject to interpretation and application by the United States Supreme Court and lower federal courts.[43]

What are the implications of this intricate jurisprudential landscape for the possible American adoption of a New Zealand-style exclusion regime?

First, the diverse and complex set of rules dealing with the exclusion of improperly obtained evidence in United States criminal trials will require American lawmakers to define the scope and focus of any multi-factored, proportionality-balancing test. Would there be just one rule for real and confessional evidence obtained (either directly or derivatively) in violation of statute, or of the *Fourth*, *Fifth* or *Sixth Amendments to the United States Constitution*? Or would the weighing exercise only be applied to certain kinds of statutory or *Bill of Rights* breaches generating physical or statement evidence in a criminal case? Jurisprudential consistency suggests that any exclusionary rule should operate freely among a wide variety of police investigative improprieties and categories of improperly obtained proof. On the other hand, policy and constitutional concerns in America could limit the all-encompassing application of a broad-based judicial power to exclude.

For example, while exclusion under the *Fourth Amendment* is conceptualised as a judicially created remedy not demanded by the constitution itself, United States Supreme Court decisions suggest that police violations of the *Fifth Amendment Miranda* rule, or the *Sixth Amendment* right to counsel, may require the exclusion of improperly obtained evidence as a matter of constitutional right.[44] Moreover, as has taken place in New Zealand under section 30 of the *Evidence Act*, American judges might be far less likely: (a) to admit confessions, as opposed to physical evidence, obtained in breach of the *Bill of Rights* (on the grounds that admission would risk the employment of unreliable evidence and erode procedural safeguards in the police interrogation context that are "fundamental to … society"[45]); or (b) to admit any type of evidence where the police misconduct producing it occurred in deliberate, bad-faith transgression of existing

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related United States federal legislation in *Corley v. U.S.*, 129 S.Ct. 1558 (2009) and Dressler, Michaels (n.1), 440, fn 130.

43 See the discussion of 18 U.S.C. § 2515 in Gina Marie Stevens and Charles Doyle, "Privacy: An Overview of Federal Statutes Governing Wiretapping and Eavesdropping" (Congressional Research Service report 98-326, December 3, 2009), 20-21 <http://www.au.af.mil/au/awc/awcgate/crs/98-326.pdf> accessed August 17, 2011.

44 Dressler, Michaels (n.1), 462-467, 490-498, 521-524.

45 *Williams* (n.26), [136]. See Optican, Sankoff (n.25), 152-153.

law[46] (a result consistent with current Supreme Court views of when physical proof obtained in violation of the *Fourth Amendment* should be excluded to deter future police wrongdoing[47]). In these and possibly other circumstances, any New Zealand-style judicial power to reject tainted evidence would, as a practical matter, be ring-fenced by American case law supporting (or virtually mandating) exclusion in particular circumstances.

Whatever the eventual scope of a refashioned United States exclusionary rule, American judges, like their New Zealand counterparts, would still ultimately have to determine how the rule should apply to various types of police improprieties producing real or confessional evidence (either directly or derivatively) in the course of a criminal investigation (see Part III(C), *post*). Moreover, as with debates over the proper scope of a broad-based power to exclude, a revised exclusionary rule's form and application will be informed by constitutional considerations under the United States *Bill of Rights*, as well as by the policy aims of exclusion recognised in American law (see Part III(B), *post*).

Finally, while any fundamental changes to the exclusionary rule are likely to be led by, and grow out of, American Supreme Court decisions, United States legislators might be attracted to a New Zealand-style remedial regime codified in statute.

As discussed earlier, the United States Congress has, in the past, investigated the idea of limiting the *Fourth Amendment* exclusion rule by legislation.[48] Congress also attempted a broader overruling of the *Miranda* exclusionary rule in 1968, an effort that was effectively ignored by judges and lawyers for decades before finally being declared unconstitutional in the 2000 Supreme Court decision of *Dickerson v. United States*.[49]

It is unclear whether, and to what extent, current or future American Supreme Court justices would react similarly to any new legislative efforts at modifying the *Fourth*, *Fifth* or *Sixth Amendment* exclusion regimes. Likewise, it is uncertain whether the United States Congress – now or in the future – might wish (or be constitutionally able) to codify a new exclusionary rule (or rules) for: (a) real versus confessional evidence; (b) evidence obtained in breach of statute; or (c) evidence, whether real or confessional, obtained directly by unlawful police activity versus derivatively tainted proof. Indeed, American lawmakers – whether Congress or the courts –

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46 See Optican, Sankoff, *ibid.*

47 See text at n.11.

48 See text at n.19.

49 530 U.S. 428. See Dressler, Michaels (n.1), 462-467.

might not end up painting all forms of police wrongdoing with the same remedial brush.

Nonetheless, were United States legislators keen to codify a judicial power to exclude in statute – a situation that, in New Zealand, resulted in the 2006 enactment of section 30 of the *Evidence Act* – American appellate judges would still probably engage in a similar jurisprudential exercise to their antipodean counterparts. Indeed, just as the New Zealand Court of Appeal did in *Williams*, United States higher courts would undoubtedly develop analytical matrices guiding the application of a codified judicial power to exclude. In this way, American judges will develop a common law of exclusion based on the considerations, factors and balances set out in any applicable legislation – a process that has continued in New Zealand from the 2007 judgment in *Williams* until the present day.[50]

B. The aims of exclusion

As previously discussed, the United States Supreme Court has consistently held to the view that the deterrence of future police misconduct is the sole aim of the exclusionary rule. Such perspective has not only galvanised the current approach to exclusion set out in the most recent *Fourth Amendment* decisions of the court, it has also driven various exceptions to the rule based on good faith police conduct,[51] the inevitable discovery of evidence notwithstanding a police breach of the *Bill of Rights*,[52] and the attenuation of any connection between an unlawful police investigation and any challenged evidence obtained as a result.[53]

In the *Fifth Amendment* context, the Supreme Court has likewise referred to exclusion under *Miranda* as serving the twin goals of "deterring improper police conduct" and "assuring trustworthy evidence" – rationales that have sometimes allowed evidence derived from a *Miranda* violation to be admitted even where the original police statement obtained in breach of the *Miranda* caution was not.[54] A similar perspective can be seen with respect to the court's treatment of confessions secured from an accused in violation of the *Sixth Amendment* right to counsel. In *Kansas v. Ventris*, the justices recognised an exception to excluding such statements when employed by the prosecution to impeach a testifying defendant in a criminal

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[50] See, for example, *Hunt v. The Queen* [2010] NZCA 528, [2011] 2 N.Z.L.R. 499; leave to appeal granted, *Hamed v. The Queen* [2011] NZSC 27; reversed in part, *Hamed* (n.32).

[51] See *Leon* (n.6).

[52] See *Nix v. Williams*, 467 U.S. 431 (1984)

[53] See *Leon*, (n.6), 911 (quoting *Brown v. Illinois*, 422 U.S. 590 (1975), 609 (Powell J., concurring)).

[54] *Missouri v. Seibert*, 542 U.S. 600 (2004), 620 (Kennedy J., concurring) (quoting *Oregon v. Elstad*, 470 U.S. 298 (1985), 308). See *U.S. v. Patane*, 542 U.S. 630 (2004).

proceeding.[55] Balancing the deterrence value of exclusion under the *Sixth Amendment* against preserving the "integrity of the trial process", Scalia J. wrote that "the game of excluding tainted evidence for impeachment purposes is not worth the candle"[56] – a conclusion likewise reached by the court where the impeachment consists of statements obtained by police in contravention of either the *Fourth Amendment*[57] or the *Fifth Amendment Miranda* rules.[58]

By contrast with the position in the United States, New Zealand judges have never viewed the deterrence of police misconduct as the primary goal underlying the exclusion of improperly obtained evidence. As the New Zealand Court of Appeal stated in *R. v. Hsu*, "the focus of granting a remedy where there has been a breach of a person's … rights is to vindicate the breach, not to punish or discipline those responsible for it".[59] Nonetheless, the court has noted that "[a]n important concern" for the vindication of rights is "to ensure that the rule of law is reinstated through cessation of any continuing breach and securing the future respect of the State for the right concerned".[60] This perspective suggests that, even while principally supporting rights, deterring future police misbehavior can be a valid aim of exclusion under the section 30 balancing exercise. Indeed, as McGrath J. observed in the New Zealand Supreme Court case of *Hamed v. The Queen*, the "effective and credible system of justice" referenced in section 30(2)(b) "must also maintain the rule of law by ensuring that [any] police impropriety when gathering evidence is not readily condoned".[61]

In focusing on the vindication of legal rights as the aim of exclusion, and balancing that rationale against the imperatives of the prosecution process, New Zealand judges have had no reason to develop the section 30 exclusionary rule – or exceptions to the rule – based solely on the costs and benefits of deterring police misconduct in any particular set of circumstances. On the contrary, the "vindication of rights" rationale would clearly support the remedy of exclusion in a criminal trial despite the fact that exclusion might not appreciably restrain future police improprieties. On the other hand, the nature of the section 30 proportionality-balancing test means that, even where exclusion would be effective in defending individual rights or deterring police misconduct, or both, such remedy might not

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55 129 S.Ct. 1841 (2009).

56 *ibid.*, 1846.

57 See Dressler, Michaels (n.1), 368.

58 See *Harris v. New York*, 401 U.S. 222 (1971).

59 [2008] NZCA 468, [30].

60 *Taunoa v. Att.-Gen.* [2007] NZSC 70, [2008] 1 N.Z.L.R. 429, [367] (McGrath J.); see also [253] (Blanchard J.)

61 *Hamed* (n.32), [258] (McGrath J.); see also [187] (Blanchard J.).

be forthcoming if countervailing public interests in prosecution convince judges to allow the employment of improperly obtained proof. In sum, it will always be judicial perceptions of the interests of justice that, in any individual case, drive the decision to admit or exclude evidence under the section 30 rule.

Should the United States Supreme Court transform the American exclusionary rule along the lines of section 30 of the New Zealand *Evidence Act*, the justices might consider revising their somewhat narrow view of the rationale for excluding or admitting improperly obtained evidence in a criminal trial. Indeed, the essence of a broad-based, multi-factored balancing test is to allow a more flexible notion of when, and for what reasons, the interests of justice suggest that tainted evidence might be admitted or excluded in any given trial. Such an approach gives little reason to focus on one selective rationale for admission or exclusion, just as it sanctions no single consideration for determining how the judicial power to admit or exclude evidence should be exercised in light of particular facts.

Nonetheless, the language of section 30, and the ostensible aims of admission or exclusion, can only be taken so far to justify any particular result. While admitting cogent evidence of criminality often supports an "effective and credible system of justice," that rationale can and will sometimes cut the other way, depending on the police misconduct involved. For example, the New Zealand Court of Appeal has suggested that prosecutors could not rely on the section 30(2)(b) injunction to consider the needs of "an effective and credible system of justice" in order to admit evidence secured by authorities through torture. The reason, said the court in *Hunt v. The Queen*, is that, among other considerations, "a system of justice which relies on such evidence is neither effective nor credible."[62]

The Court of Appeal has, in fact, acknowledged that supporting the effectiveness of prosecution processes is only "one of the objectives that the [section 30] balancing exercise [was] intended to achieve".[63] The New Zealand Supreme Court has expressed a comparable view, affirming – as Tipping J. put it in *Hamed* – that the standard for admissibility set out in section 30(2)(b) "involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally".[64] Similarly, in *Herring*, Ginsburg J. – dissenting with Stevens, Souter and Breyer JJ. of the American Supreme Court – observed that, while the main objective of the *Fourth Amendment* exclusionary rule is to deter

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62 *Hunt* (n.50), [83].

63 *R. v. Chapman* [2011] NZCA 410, [22]; leave to appeal denied, *Chapman v. R.* [2011] NZSC 124.

64 *Hamed* (n.32), [229] (Tipping J.).

police misconduct, "the rule also serves other important purposes".[65] According to her Honour:

> "It 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and it 'assur[es] the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'"[66]

While set out in a dissenting judgment, these comments make clear that alternatives to the police deterrence rationale are neither impossible nor unheard of as regards the United States exclusionary rule. Nonetheless, Dressler and Michaels have noted that, at present, "non-consequentialist arguments of this sort carry little or no sway with the [majority of] the Supreme Court".[67] Moreover, and as just discussed, the point of a broad-based, multi-factored approach to exclusion is that no single policy justification – consequentialist or otherwise – should always determine whether evidence will be admitted or rejected in a criminal trial. As the former American Supreme Court Chief Justice William Rhenquist once declared:

> "[W]hile it is quite true that courts are not to be participants in 'dirty business', neither are they to be ethereal vestal virgins of another world… ."[68]

Indeed, barring, no doubt, the most extreme situations of police wrongdoing – such as evidence obtained by torture – an exclusionary rule grounded in a judicial decision on the facts must always assess the competing and complementary goals to be served by admission or exclusion in any particular criminal proceeding. Accordingly, and by contrast with the current American focus solely on the costs and benefits of deterring police misconduct, policy aims such as discouraging investigative improprieties, maintaining the integrity of trial and justice processes, vindicating rights, or convicting the guilty will, to the extent applicable, either limit or animate each other when applied within a broad-based judicial power to exclude.

Finally, and at the very least, abandoning an exclusive focus on deterring police misconduct would likely curtail longstanding (and continuing) debates in the United States over: (a) whether any particular application of the *Fourth Amendment* exclusionary rule does, in fact, deter the kind of police impropriety that produced the tainted evidence in the first place; and (b) whether, in any individual or

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65 *Herring* (n.4), 152 (Ginsburg J., dissenting) (quoting *Calandra*, (n.2), 357 (Brennan J., dissenting)).

66 *ibid.*

67 See Dressler, Michaels (n.1), 360.

68 *California v. Minjares*, 443 U.S. 916 (1979), 924 (Rehnquist J., dissenting).

recurring set of circumstances, such deterrence operates in a sufficiently robust manner to bear the cost of excluding cogent evidence of guilt in criminal proceedings.[69] It would also permit American courts to explore more fully any tailored rationales for exclusion stemming from particular constitutional contexts – such as the goal of assuring trustworthy evidence that, as previously noted, the Supreme Court has recognised as a legitimate rationale for excluding confessional statements obtained by police questioning in breach of *Fifth Amendment Miranda* rules.[70]

C. Defining and applying the factors (the problem of judicial decision-making)

The American cost-benefit approach to *Fourth Amendment* exclusion set out in *Hudson*, *Herring* and *Davis* examines whether, in criminal trial proceedings, police investigative misconduct is culpable enough to justify the deterrence benefits to be gained by disallowing tainted evidence of guilt.[71] However, while such orientation is reminiscent of the New Zealand proportionality-balancing test, the United States Supreme Court has never engaged in the kind of fully realised, multi-factored assessment codified in section 30 of the New Zealand *Evidence Act*. On the contrary, by asking only whether police misbehaviour is sufficiently blameworthy to validate the deterrent effects of exclusion, the court focuses on merely one consideration – the nature and characterisation of official acts of unlawfulness – that forms part of the full section 30 calculus.[72] Indeed, while New Zealand law could give significant (perhaps conclusive) weight to the deliberate or grossly reckless nature of police wrongdoing, such a feature would always have to be balanced against the other relevant matters set out in section 30(3).[73] As previously discussed, these include not only the seriousness of the crime, but, among other factors, the cogency and probative value of the wrongly obtained evidence, its centrality to the prosecution case, whether the evidence could have been obtained by lawful investigative means, and whether police acted in a situation of urgency or emergency when securing improperly obtained proof.[74] By comparison, while penalties to the prosecution process fill out the other side of the United States Supreme Court's cost-benefit scales, application of the current American approach to exclusion seems principally pegged to one

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[69] See Dressler, Michaels (n.1), 356-59. Compare Oklewicz (n.15) with Kerr, "Good Faith, New Law, and the Scope of the Exclusionary Rule" (n.15).

[70] See text at n.54.

[71] See text at n.9 *et seq*.

[72] See text at n.29 *et seq*.

[73] See text at n.34.

[74] See text at n.29 *et seq*.

independent variable – the characterisation of police misconduct – in any *Fourth Amendment* case.

However, if the United States exclusionary rule ever does move in the direction of the New Zealand model, American lawmakers will need to contend with a number of matters involving the focus, substance and application of a broad-based judicial power to exclude.

First, as discussed in Part III(B), *ante*, a proportionality-balancing test, like section 30 of the New Zealand *Evidence Act*, should permit courts to consider a number of competing and complementary goals (broadly centred around the interests of justice) when deciding to admit or exclude tainted evidence in a criminal trial. This explains the emphasis in section 30(2)(b) on whether exclusion is a "proportionate" response to the police impropriety at issue in the proceeding – language allowing New Zealand judges to evaluate various policy objectives underlying application of the section 30 regime. Reflecting such diverse aims, a multi-factored analysis likewise requires the setting out of specific balancing considerations that are relevant to the judicial power to exclude. Finally, judges must be guided in the application of their decision-making, whether by the language of a codified test for exclusion or by common law judgments – typically at the appellate level – that establish a schema of analysis to be followed in any individual case.

The requirements of a New Zealand-style exclusionary rule are several and, as just described, can cause difficulties in the interpretation and application of such a rule by lower and higher courts. Indeed, in the years following the New Zealand Court of Appeal decision in *Shaheed*, academic commentators complained that, "while maximising the flexibility available to judges with respect to the decision to exclude, the proportionality-balancing test … was vague, lacking in structure, and capable of continual manipulation by decision-makers to reach a desired result".[75] Criticism was also levelled at the absence of guidance regarding just how the *Shaheed* factors should be interpreted and weighed against each other to make a determination on any given set of facts.[76] It was also suggested that proportionality-balancing would allow "the personal predilections of judges to masquerade as principle" and, in practical application by typically conservative courts, be likely to "[favour] punishment of the guilty and pragmatic (albeit improper) policing over the protection of individual rights".[77]

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[75] See Optican, "Interpretation and Application of *R. v. Shaheed*" (n.24), 454. See also Optican, Sankoff, *Evidence Act Revisited* (n.25), 23-28.

[76] Optican, *ibid.*

[77] *ibid.*, 455-456.

As far back as 1984, distinguished American law professor Yale Kamisar noted similar objections to the adoption of a balancing test for exclusion under the *Fourth Amendment to the United States Constitution* – an approach he referred to as an exercise in "comparative reprehensibility".[78] According to Professor Kamisar:

> "'[C]omparative reprehensibility' balancing would call for especially subjective determinations and would constitute … an almost open invitation to nullification [of the exclusionary rule] at the trial court level … . Where else will a conscientious judge who embarks on comparative reprehensibility find herself but 'wholly at sea'? How does she go about determining whether the burglary of a coin shop exceeds the gravity of a search without a warrant? … I see nothing in 'comparative reprehensibility' balancing that implies any inherent restraint on the erratic, indeed capricious, application of the exclusionary rule. A judge, even one acting in good faith (if I may use that term), could characteri[s]e almost any felony, certainly almost any major one, as more reprehensible than almost any [*F*]*ourth Amendment* violation."[79]

There is much to be considered in both the American and New Zealand critiques of an exclusionary rule grounded in proportionality-balancing and geared towards a circumstance-specific, multi-factored assessment of the interests of justice in every individual case. On the other hand, the criticisms of a section 30-style rule can, to an appreciable extent, be answered in several ways.

First, the inherent problems attending the exercise of judicial power are not unique to an exclusionary rule built on balancing. Much judicial decision-making involves weighing various factors and considerations to reach a result on any given set of facts. However, it has never been suggested that, owing to such method, courts should not be permitted to make judgments when considered appropriate and necessary – whether dealing with evidence, procedure, or any other matter.

Secondly, as exemplified in a codified exclusionary rule like section 30, together with appellate cases such as the New Zealand Court of Appeal decision in *Williams*, judges need not be left completely at sea in deciding whether to exclude improperly obtained evidence in a criminal proceeding. On the contrary, the very terms of section 30 present courts with specific criteria relevant to their decision on exclusion. Moreover, *Williams* – as previously discussed – responded to academic criticism of proportionality-balancing by setting out a

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[78] Yale Kamisar, "'Comparative Reprehensibility' and The *Fourth Amendment* Exclusionary Rule" [1984] 86 Michigan Law Review 1, 16-18 (internal quotations omitted).
[79] *ibid.*

structured analytical matrix for applying the section 30 scheme.[80] It also sought to explain how courts should generally interpret the various section 30 factors, and how judges should typically weigh them against each other to reach a result in any particular case. While not perfect – and always subject to refinement or reconsideration[81] – the *Williams* analytical matrix has brought a reasonable amount of clarity to the section 30 exercise, both with regards to trial court decision-making and appellate review of the judicial decision to exclude.

Thirdly, it has not been the experience in New Zealand – and particularly not since *Williams* – that the judicial option to admit or exclude improperly obtained evidence in a criminal proceeding has been exercised in a particularly arbitrary or capricious fashion. While one can disagree with various section 30 results reached by trial and appellate courts, judgments under the proportionality-balancing test have fallen into patterns that are reasonably predictable and subject to rational discernment.[82] Nor has it been the case that New Zealand judges – whether at the trial level or on appeal – have effectively nullified the exclusionary rule through their section 30 evaluations. While improperly obtained evidence is regularly admitted in criminal proceedings under the *Evidence Act*, real and confessional evidence obtained by police wrongdoing is likewise regularly excluded – even where the crime may be considered serious and the evidence central to the prosecution case.[83]

In sum, the lessons of New Zealand jurisprudence are that problems related to (a) the control of judicial decision-making, and (b) the rational elaboration of matters relevant to a proportionality-balancing test for the exclusion of improperly obtained evidence, are neither insurmountable nor impossible to manage. To be sure, the application and development of section 30 has been far from smooth and subject to debate. However, that is not unusual – in either the United States or New Zealand – with respect to the promulgation of new rules of evidence or procedure subsequently applied in criminal trials.

Regardless of the eventual contours of any new American exclusionary rule, the discussion above should suggest that, for United States lawmakers – whether legislators or the courts – the key to successfully establishing a new exclusion regime would be a public dialogue about the relevant aims and components of a broad-based,

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80 See text at n.26 *et seq*.

81 See, for example, the application and discussion of section 30 by the New Zealand Court of Appeal in *Hunt* (n.50) and the Supreme Court in *Hamed* (n.32).

82 See Optican, Sankoff, *Evidence Act Revisited* (n.25), 152-154.

83 *ibid.*

multi-factored approach grounded in the overall interests of justice. Such discourse could then be set out, so far as possible, in a clear and well-defined statutory test, or through common law judgments laying out the approach to be taken. In doing so, American legal thinkers may adopt the same or different considerations as those comprising section 30 of the New Zealand *Evidence Act*, and will undoubtedly imbue such matters with their own interpretations and weightings as regards the judicial power to exclude. The goal, however, will be to shape and guide, in a coherent fashion, current application and future development of a revised United States' exclusionary rule. This would spare an American approach to exclusion based on judicial balancing the pitfalls presciently identified by Professor Kamisar so many years ago.

D. "Gatekeeper" issues

Prior to the New Zealand Court of Appeal decisions in *Shaheed* and *Williams* – and codification of the proportionality-balancing test in section 30 of the *Evidence Act* 2006 – judges controlled access to the *prima facie* exclusionary rule by enforcing reasonably strict requirements of standing and causation. Indeed, criminal defendants often found their appeals to the rule blocked by arguments that the evidence to be admitted against them was: (a) not obtained in violation of their own rights (lack of standing); (b) was not sufficiently connected to a police breach of law (inconsequentiality); or (c) would have been discovered in any event notwithstanding the police impropriety that produced the tainted proof (inevitable discovery).[84]

However, following replacement of the *prima facie* rule of exclusion by proportionality-balancing, the Court of Appeal, in *Williams*: (a) relaxed the requirements of standing and causation; (b) minimised the role of standing, inconsequentiality and inevitable discovery as "gatekeepers" of an accused person's access to the exclusionary rule; and (c) re-designated such considerations as simply factors that judges can consider – among the others listed in section 30(3) – when applying the proportionality-balancing test.[85]

The rationale behind these changes stemmed from the nature of the broad-based approach to admission or exclusion ultimately codified in the New Zealand *Evidence Act*. As legal commentators have pointed out, the type of multi-factored, balancing regime exemplified by section 30 creates no justification for treating a strict standing requirement as a threshold feature of the exclusion

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84 Scott Optican, "Criminal Procedure" (n.28), 178-179, fn.124.

85 *Williams* (n.26), [47]-[78], [79]-[103], [126]-[129], respectively.

exercise.[86] Similarly, "the presence and strength of a causal connection – including whether the tainted evidence would have inevitably been discovered by lawful means – [is best weighed] against other factors and in the light of the rationales that the exclusionary rule [was] designed to advance".[87]

To be sure, a New Zealand criminal defendant seeking exclusion under section 30 is far more likely to be successful if police obtained evidence through a clear and demonstrable connection (directly or derivatively) with a breach of that individual's own legal rights.[88] On the other hand, weaker claims to standing or causation could still lead to exclusion where the police misconduct was sufficiently serious or culpable – a result reflecting the flexibility afforded by the section 30 "balancing" approach, as well as its focus on the overall interests of justice in any particular case.[89]

The "gatekeeper" requirements previously existing in New Zealand law mirror those currently seen in United States jurisprudence governing the exclusion of evidence for breaches of the American *Bill of Rights*. As Dressler and Michaels explain, the more categorically applied doctrines of standing, inevitable discovery and causal insignificance in United States law are basically declarations by the American Supreme Court that, in certain circumstances, the perceived goal of exclusion – deterring police misconduct – is no longer justified by its costs – the loss of cogent evidence in criminal proceedings.[90] In essence, and to the extent they are relevant to particular police breaches of the *Bill of Rights* leading to real or confessional evidence in a criminal case, such principles are policy determinations by the court functioning as "purposeful limitation[s] on the effect of the [American] exclusionary rule".[91]

It was suggested in Part III(B) *ante* that, should United States law move in the direction of a balancing test for exclusion similar to

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86 See Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney, *The New Zealand Bill of Rights* (Oxford University Press 2003), 798-799; Richard Mahoney, "Evidence" [2006] New Zealand Law Review 105, 115–116 ["Evidence 2006 No 1"]; Richard Mahoney "Evidence" [2006] New Zealand Law Review 717, 731–732 ["Evidence 2006 No 2"]; Richard Mahoney "Evidence" [2008] New Zealand Law Review 195, 197. This view is supported by the language of section 30 itself. Section 30(1)(a) permits an application to exclude improperly obtained evidence to be made by the person "*against whom* the evidence is offered" (emphasis added), regardless of whether the applicant's rights were themselves breached by the police misconduct generating the evidence subject to challenge in the particular case.

87 Optican, "Interpretation and Application of *R. v. Shaheed*" (n.24), 515 (quoting Optican, Sankoff, "Preliminary Assessment of *R. v. Shaheed*" (n.21), 41).

88 See Richard Mahoney, "Evidence 2006 No 2" (n.86), 732.

89 See Richard Mahoney, "Evidence 2006 No 1" (n.86), 116.

90 See Dressler, Michaels (n.1), 360-361, 382-392, 49-498, respectively.

91 *ibid.*, 330.

section 30 of the New Zealand *Evidence Act*, it would make sense for courts in that country to consider wider and more nuanced policy aims – other than the deterrence of police misconduct – when deciding whether to admit or exclude improperly obtained evidence in a criminal trial. Likewise, the shift towards a more comprehensive, "interests of justice" approach should suggest to United States judges that there ought to be no strict gatekeepers of a defendant's access to the exclusionary rule. On the contrary, imposing any kind of firm threshold requirement on the exercise of a judicial power to exclude runs the risk of pre-empting the very determinations that ought to be made under a comprehensive proportionality-balancing test. The same is true with the promulgation of pre-set exceptions to exclusion – such as the inevitable discovery doctrine – or with the endorsement of any fixed consequences for exclusion stemming from applied principles of inconsequentiality or causal attenuation. Indeed, insofar as such tenets do function as purposeful limitations on an exclusionary rule, they should be employed merely as factors informing any broad-based judicial power to deal with improperly obtained proof. In this way, United States judges could assess their relative strength and significance – with respect to either the admission or rejection of tainted evidence – in light of all the matters and policy considerations relevant to a decision on exclusion in any particular case.

IV. CONCLUSION

The approach of American courts to the exclusion of evidence improperly obtained by the police has evolved, and will no doubt continue to evolve, through individual judicial decisions and, in particular, the pronouncements of the United States Supreme Court. While still a widely applied remedy when police secure evidence in unreasonable searches and seizures violating the *Fourth Amendment* to the *United States Constitution*, the court's most recent judgments have looked for circumstances where the stated benefits of exclusion for deterring varying degrees of police misconduct are considered to justify the costs to the justice system of rejecting cogent evidence in criminal trial proceedings.

Should the United States' law on excluding evidence obtained in breach of the *Fourth Amendment* continue its apparent trend towards cost-benefit balancing in each particular case, it might well evolve into the type of full-blown, multi-factored, proportionality-balancing approach currently codified in section 30 of the New Zealand *Evidence Act*. Moreover, if a new and coherent American exclusionary rule were sought, such reform might also encompass the treatment of evidence obtained in most or all instances of police investigative

unlawfulness discussed in this article – including breaches of statute, questioning in violation of either the *Fifth Amendment Miranda* regime, or the *Sixth Amendment* right to counsel.[92]

As set out in section 30 of the New Zealand *Evidence Act* 2006 (and elaborated above), New Zealand judges must weigh a number of factors to determine whether the exclusion of improperly obtained proof – both real and confessional – is a just and proportionate response to the police wrongdoing in an individual case. In doing so, courts have to engage in a nuanced decision process that assesses principally the nature and seriousness of the official investigative misconduct (whether a breach of the New Zealand *Bill of Rights*, statutory controls on police activity, or unfair police questioning practices), the seriousness of the offence and the value of the evidence – together with a number of other considerations set out under section 30 and elaborated in New Zealand case law. Judges must likewise weigh such matters in light of the various policy goals served by permitting or rejecting improperly obtained evidence in a criminal trial. While every determination is unique, the Court of Appeal decision in *Williams* demonstrates how New Zealand jurists have attempted to lay down a structured approach to exclusion that guides both the judicial employment of section 30 and the expected outcomes of proportionality-balancing when applied to particular constellations of facts.

If United States law does shift in a direction akin to the New Zealand regime, its judges and legislators will need to deal with multiple facets of an exclusionary rule based on a balancing model and designed to consider various factors and policy matters relevant to the interests of justice in any individual case. As discussed in this article, the main issues for examination include:

a) the desirable (and constitutionally permissible) scope and exposition of a proportionality-balancing test – including the respective responsibilities of American legislators and courts in promulgating a new exclusion regime;
b) the goals to be served by the exercise of a broad-based judicial power to accept or reject improperly obtained evidence in criminal proceedings – which may include aims beyond the mere deterrence of police misconduct that is the current focus of United States Supreme Court jurisprudence;
c) the rational elaboration and application of balancing factors relevant to a new exclusionary rule – encompassing both controls on judicial decision making and the manner in which American judges will assess the interests of justice in any particular set of circumstances; and

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92 See Pt III(A), *ante*.

d) the status of "gatekeepers" to the current United States exclusionary rule – including matters of standing, inevitable discovery and causal inconsequence – and their potential role simply as factors (with varying degrees of weight) within a new proportionality-balancing approach.

As stated in the introduction, this article was not intended to examine which jurisdiction – New Zealand or the United States – displays the "better" legal method (whatever that may mean) for dealing with evidence improperly obtained by the police. Nor has it been the task to recommend or promote a New Zealand-style exclusionary rule to American lawmakers – a decision that can only be made by United States judges or legislators, or both, following careful deliberation and debate. However, while the future of the United States exclusionary rule may be difficult to predict, New Zealand's jurisprudence offers an approach that could serve as a model for a new American exclusion regime. Should that prove to be the case, and as elaborated in the analysis above, the "Kiwi" experience could offer "lessons from down under" regarding the scope, nature and substance of a revised body of United States law on the exclusion of improperly obtained evidence in criminal trials.

"I DON'T WANT TO PLAY FOLLOW THE LEADER": THREE PROPOSALS FOR REFORM OF THE CROSS-EXAMINATION OF CHILD WITNESSES

*DAVID CARUSO**

ABSTRACT

This article makes three proposals. Leading questions should not be permitted in cross-examining child witnesses who complain of a sexual offence. Experts should be available to assist the presiding judge monitor and respond to the effect of examination on child complainants throughout the course of their testimony. Child complainants should be directed by the presiding judge to interrupt their questioning and alert the court to any difficulties they experience whilst giving evidence. The proposed reforms stem from analysis of the fundamental purposes and aims of witness examination and the trial process, empirical psychological studies, the effective use of expert evidence, practicality, and cost effectiveness. The proposals would improve the quality of evidence given by children; provide judges with better guidance on when and how to intervene in the trial process for their protection; and lessen the strain on child witnesses, when giving evidence.

I. INTRODUCTION

This article argues that leading questions should not be permitted in cross-examining child complainants of sexual offending. Experts should be available to assist the presiding judge monitor and respond to the effect of examination on child complainants throughout the course of their testimony. Child complainants should be directed by the presiding judge to interrupt their questioning and alert the court to any difficulties they experience whilst giving evidence.

Part II argues for reform that presumptively prohibits leading. To call a leading question a "question" is a misnomer. This part first examines what is actually meant by, and what actually is, a leading question. It is argued that cross-examination and leading questions should be seen as separate and distinct. On that basis, the way in which counsel generally use leading questions is considered, so as to identify the purpose of such leading in cross-examination. It is

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argued, with reference to empirical studies, that leading questions are unhelpful in adducing evidence from a child that assists the fact-finding task.

Current legislation in Australian jurisdictions, permitting the court to restrict leading questions is, it is argued, largely ineffective. This is primarily because it places power with the court, rather than responsibility with counsel. The argument is made for a *presumptive* prohibition of leading questions. While the presumption may be displaced, the starting point should be that leading questions are impermissible.

From the perspective of cross-examining counsel, it is argued that the present ability to lead is counterproductive and unnecessary for the vigorous and fair development of the defence case in accordance with statutory and common law rules. As a result, potential positive effects of the proposed presumption against leading for counsel and the conduct of the defence case are discussed.

Part III argues that expert assistance should be available to help the presiding judge monitor and respond to the effect of examination-in-chief and cross-examination on child complainants, throughout the course of their testimony. A suitably qualified expert should be present whenever the child gives evidence. This expert would monitor and alert the presiding judge to conditions of, and circumstances about, the child – particularly those which may not be apparent to an untrained person – which should be taken into account by the court in assessing the witness's state of mind. The expert would also be able to offer advice as to any possible responses that may be warranted on the part of the court.

The arguments that have been made for greater admission of expert evidence in the context of sexual assault trials involving child complainants are considered. They are distinguished from the present proposal, which is to have the expert as an aid to the presiding judge in guarding against causing the child undue distress, and generally in seeking to ensure the child's well-being throughout his or her examination. The proposal directly addresses the lacuna in the current law, which empowers the court to intervene to protect a child witness, but does not assist the court in determining when or how to intervene.

The practical operation of the reform is explained – designed to allow the expert to assist and advise in a manner that ensures that the presiding judge remains the final arbiter of any assessment of the witness's state of mind and the type of any intervention, and to reduce, as far as possible, the likelihood of the expert's assistance giving grounds for appeal. It is not intended to undermine the role of the court and counsel – particularly prosecuting counsel as the party calling the child witness. However, the proposed reforms are

founded on the recognition that counsel is not an expert in the field of child psychology or physiology. It therefore aims to establish a mechanism to monitor the witness under examination, to protect the child, whilst best serving the interests of justice.

Part IV proposes that the presiding judge should ask a child witness – especially a child complainant – to tell the court whenever he or she feels uncomfortable, upset, or confused by the questions asked, by the courtroom situation, or by anything else; and, from time to time, should remind the child to do so. This proposal aims to avoid guesswork by the court, and guide it on when and how to act.

This article deals with each proposal in the context of Australian law and experience. However, it draws analogies with, and refers to, practice in other jurisdictions. Most, if not all, criminal justice systems in common law jurisdictions face the difficulties which these proposals aim to address. The proposed reforms are therefore relevant to all such jurisdictions.

As to feasibility, the only significant cost is that of the expert witnesses needed to implement the second proposal. Some education and training would help expedite the effective implementation of the proposals, and this is discussed below. Such educational requirements would not be detailed or complex: lawyers know how to put non-leading questions, experts are readily available, and judges are well used to formulating and giving directions.

II. FIRST PROPOSAL: THE PRESUMPTION AGAINST LEADING

Leading questions are synonymous with cross-examination.[1] The ability to lead in cross-examination is the fundamental difference with examination-in-chief.[2] Putting leading, and only leading, questions, is

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1 See, *e.g.*, *Parkin v. Moon* (1835) 7 C&P 408, 173 E.R. 181, and *Dickinson v. Shee* (1801) 4 Esp 67, 170 E.R. 644.

2 See ss.37 and 42 of the uniform evidence law (on the uniform law, see end of this note), see further Andrew Ligertwood, Gary Edmond, *Australian Evidence: a Principled Approach to the Common Law and the Uniform Evidence Acts* (LexisNexis Butterworths, NSW, 5th ed, 2010) 698. Such statutory enactments reflect the common law allowance of leading in cross-examination as opposed to the right to lead, see *Mooney v. James* [1949] V.L.R. 22 (Supreme Court, Victoria), 28-9. The uniform evidence law began with the *Evidence Act* 1995 (Cth), to which there was Royal Assent on February 23, 1995. Virtually identical legislation shortly followed in New South Wales, *Evidence Act* 1995 (N.S.W.), and the Victorian adoption, the *Evidence Act* 2008 (Vic.), entered into force on January 1, 2010. Tasmania adopted the uniform laws in 2001 and the Australian Capital Territory recently moved to independently adopt it, *Evidence Act* 2011 (A.C.T.), as has the Northern Territory, *Evidence (National Uniform Legislation) Bill* 2011 (N.T.). There are differences between the evidence acts of the jurisdictions that follow the uniform law, as will be seen from certain differences between the provisions of N.S.W. and Victoria discussed below, but, ostensibly, the laws are uniform. Queensland, South Australia and Western Australia have not

taught as paramount, when training advocates in cross-examination.[3] Leading questions are often seen as necessary to comply with other rules of evidence, such as the rule in *Browne v. Dunn*.[4] In arguing against the viability of leading questions, this article is not intended as an attack on cross-examination.[5] It does not seek to contest Wigmore's view that cross-examination is "the greatest legal engine ever invented for the discovery of truth",[6] but to remember that this praise was for "effective" cross-examination.[7] It is argued that leading questions most often produce cross-examination of children which is ineffective, unhelpful and even counterproductive to the aims of the criminal trial and the well-being of the witness.[8] This is

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adopted the uniform laws. They follow the common law, as modified by their respective evidence acts.

3 See, *e.g.*, Iain Morley Q.C., *The Devil's Advocate* (2nd edn, Sweet & Maxwell 2009) 158-9; Thomas A. Mauet, Les A. McCrimmon, *Fundamentals of Trial Technique* (3rd edn, Lawbook Co. 2011) 199-200. See also Irving Younger, *The Art of Cross-Examination* (American Bar Association Monograph Series No. 1, 1976), commandment three of his 10 Commandments on cross-examination is: "use only leading questions".

4 (1893) 6 R. 67 (House of Lords): a cross-examiner must put the nature of his case in full to the witness in cross-examination, to give him or her the opportunity to comment on or explain the contradictory version. See Mauet, McCrimmon, (n.3), 195-6; Russell Boyd, Anthony Hopkins, "Cross-examination of Child Sexual Assault Complainants: Concerns about the Application of s.41 of the *Evidence Act*" (2010) 34 *Criminal Law Journal* 149, 156: "As a consequence of receiving instructions from the accused denying the charge, the defence lawyer *must* challenge the truthfulness of the complainant. This is explicitly required by the rule in *Browne v. Dunn*". *Cf. Thomas v. Van Den Yssel* (1976) 14 S.A.S.R. 205, 207, where Bray C.J. observed strict compliance with the rule may be unnecessary and even improper, where the opposing party clearly contests the credibility and general accuracy of the witness, as in the primary cases the concern of this article being those involving cross-examination of alleged child victims of sexual offending.

5 It is not to contest that "[c]onfrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial": *Lee v. The Queen* (1998) 195 C.L.R. 594 (High Court of Australia), 602 (Gleeson C.J., Gummow, Kirby, Hayne and Callinan JJ.); see also *Osolin v. The Queen* (1993) 86 C.C.C. (3d) 481 (Supreme Court of Canada), 516-7.

6 John H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn Rev., Little Brown 1974) vol. 8, [1367].

7 *ibid.* Wigmore observed that "*effective*" cross-examination was the great contribution of the Anglo-American system to improving trial procedure, and the absence of "effective" cross-examination contributed to the failures of continental legal systems.

8 Placing the aims of the criminal justice system ahead of the well-being of the witness is intentional: these reforms are not simply aimed at protecting the child, which approach has a tendency to treat the child as a victim. The child is not a victim, but a witness. The reforms proposed in this article aim to promote the fact-finding mission, by protecting witnesses from undue adversity, which negatively affects the quality of their evidence. It is in this context that their well-being is of concern. See further Part II, *post*.

posited on a recognition that the purpose of cross-examination, and the purpose of leading, are distinct, and often at odds.[9]

A. The aim of cross-examination

The rules of evidence are designed to facilitate the finding of fact in an adversarial trial.[10] The English Court of Criminal Appeal stated it plainly: "[w]hat is wanted from the witness is answers to questions of fact".[11] The interrogation of a witness to ascertain fact (optimistically termed "truth" by Wigmore[12]) is the purpose of cross-examination: it is what cross-examination is designed to do. The evidential rules concerning cross-examination have the enablement and facilitation of the search for fact as their object.[13] To ensure that a witness is testifying to facts, the process must dispel reasons to think his or her testimony is unreliable. Cross-examination tests the accuracy and reliability of the witness's recall as well as his or her credibility.[14] Its purpose is to allow the cross-examiner to sift a witness's testimony for fact, by catching reasons for fiction in a fine web of questions.

B. The form and aims of leading questions

Leading questions, on the other hand, do not promote a search for fact: they allow facts to be asserted by the cross-examiner. Leading questions state, or at least suggest, the answer the cross-examiner wants. They are similarly defined by both law and psychology.[15] Under the *Uniform Evidence Acts*,[16] a leading question is one which:

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9 See Boyd, Hopkins (n.4), 154: "Discovery of the truth is not the purpose of the cross-examiner, even if it may be the purpose of the trial".

10 See Andrew Ligertwood, *Australian Evidence* (4th edn, LexisNexis Butterworths 2004) *preface*, xv.

11 *R. v. Baldwin* (1925) 18 Cr.App.R. 175 (E.&W. Court of Criminal Appeal), 178-9. See also *R. v. Ruptash* (1982) 68 C.C.C. (2d) 182 (Alberta Court of Appeal), 188-9.

12 A former D.P.P. for New South Wales has characterised the adversarial criminal trial as a war in which truth is the first casualty, despite pretences to the contrary: Nicholas Cowdrey A.M., Q.C., "Justice in Pursuit of Lawyers" (Speech delivered at St. James Ethics Centre, Sydney, August 26, 1997), published in Evan Whitton, *The Cartel* (Herwick 1998), 92.

13 See *Libke v. The Queen* [2007] HCA 30, (2007) 230 C.L.R. 559, 599.

14 See Ligertwood, Edmond (n.2), 698; see also Marcus Stone, *Cross-examination in Criminal Trials* (2nd edn, LexisNexis Butterworths 1995); Leo Hickey, "Presupposition under Cross-Examination" (1993) 6 International Journal for the Semiotics of Law 89.

15 See Ian R Coyle *et al.*, "Out of the Mouths of Babes: the Case for an Increased Use of Expert Evidence in Rebuttal of Sexual Abuse Allegations by Child Witnesses" (2009) 33 Criminal Law Journal 139, 145.

16 See n.2, *ante*.

e) directly or indirectly suggests a particular answer to the question; or
f) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

These definitions mimic the common law acceptance of a leading question as one that either suggests the answers desired or suggests the existence of disputed facts.[17] The first is the classic example of a leading question, and such questions are well known.[18] As to the second type of leading question described, it is difficult to see how such a question can ever be allowed, except in the case of expert witnesses, where it is legitimate for the existence of fact to be assumed in order to express an opinion.[19] In respect of ordinary witnesses, this second type of questioning is not only leading but improper, and should always be disallowed.[20]

To describe a question as "leading" is to describe the *form* of the question. Every leading question can be rephrased so as to be non-leading: "You're making this up, aren't you?" rephrased as "Are you making this up?" No *substance* is lost with that alteration: the same question is being asked.[21] So it is nonsensical to suggest leading questions are necessary for the proper and full presentation of the substance of a party's case. More importantly, the very fact that it is the form of the question which is being toyed with, rather than the substance of the question, raises the issue of what the effect of that attention to form is aimed at achieving. Leading questions allow cross-examiners to tell the court the story they want the court to accept (the story simply has to be punctuated with question marks). Leading can become a vehicle for editorialising in the absence of judicial control[22] – which control, even if exercised assiduously, places the responsibility with the presiding judge rather than counsel: a position this part contends should change. Questions laced with unchecked comments may mean that the witness cannot properly

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17 This is in effect the definition in Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (12th edn, MacMillan & Co 1936), art. 140.

18 See Australian Law Reform Commission, *Evidence (Interim)*, (ALRC 26, 1985) vol. 1, [619].

19 See Stephen Odgers S.C., *Uniform Evidence Law* (9th edn, Lawbook Co. 2010), 150.

20 See Arthur R. Emmett Q.C., "Examination in Chief and Re-examination" (1987) 3 Australian Bar Review 93, 95-9.

21 See Boyd, Hopkins (n.4), 163.

22 The duty of the cross-examiner is to ask questions, not to inject "personal views and editorial comments into the questions": *R. v. Bouhsass* (2002) 169 C.C.C. (3d) 444 (Ontario Court of Appeal), [12]. The duty is timeless, see *R. v. Hardy* (1794) 24 Howell State Trials 199, 753-4; *R. v. Ings* (1820) 33 Howell State Trials 957, 999; *Rees v. Bailey Aluminium Products Pty Ltd* [2008] VSCA 244, (2008) 21 V.R. 478, [80].

respond and the comment is accorded undue weight by the jury.[23] Leading questions avoid alternative choice based questioning that would actively involve the witness, and are aimed at eliciting consistent positive passive responses: "yeah"-saying.[24] The effect of passive responses is wholly repugnant to the fact-finding aims of the adversarial process.[25]

The point is that a question the law understands to be, and utilises as, a leading question, is not a question at all. It is a statement or suggestion, with an inquisitorial sentiment tacked to the end: "He didn't touch you, did he?" Accurate punctuation, reflecting what counsel wishes the court to hear, would discard the comma for an ellipsis: "He didn't touch you … did he?" "You're making this up … aren't you?"[26] It is the statement which is to resonate, not the inquiry.

The purpose of such statements is not to weave a web of questions to entrap the facts, but to assert the facts which one party contends, in the face of the witness and for the ears of the court.[27] Leading questions thus actually oppose the ends of cross-examination that make the latter so prized by the adversarial system. Are leading questions necessary to state clearly an opponent's case; to confront witnesses with what "the truth" actually is;[28] or otherwise to unsettle witnesses so as distract them from their ruse and thereby extract truth from *their* web of fiction? Neither the way in which cross-examination is approached by counsel, nor empirical psychological study of the effect of leading questions, supports such fact-finding aims or outcomes in leading.

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[23] See *R. v. Robinson* (2001) 153 C.C.C. (3d) 398 (Ontario Court of Appeal), [45].

[24] See Sandra J. Harris, "Questions as a Mode of Control in Magistrates' Courts" (1984) 49 International Journal of Society and Language 5. Remembering, of course, that a question can be formulated so as to call for a "Yes" or "No" answer which makes no assumption of fact and without the slightest implication that "Yes" rather than "No" is the hoped for answer, see *Saunders v. The Queen* (1985) 15 A.Crim.R. 115 (Western Australia Court of Criminal Appeal), 122.

[25] See Mark Brennan, "The Discourse of Denial: Cross-Examining Child Victim Witnesses" (1995) 23 Journal of Pragmatics 71.

[26] See *R. v. MacDonnell* (1909) 2 Cr.App.R. 322 (E&W Court of Criminal Appeal), where it was observed that questions put to a prisoner in cross-examination ought to be put in an interrogative form, commencing "Did you?" and not "You did".

[27] There is ample scope for that to be done in addresses, see *Randall v. R.* [2002] 2 Cr.App.R. 17 (Privy Council (Cayman Is.)), [10].

[28] Prohibiting leading will not hinder compliance with *Browne v. Dunn*. A party can put its case without leading. Every leading question can be rephrased as non-leading. Substance will not diminish but the level of aggression might. See also n.4, *ante*.

C. The effect of leading on the quality of evidence

In leading, the cross-examiner is not interrogating a witness for the benefit of the court but communicating with the jury.[29] The focus on communication with the jury rather than with the witness[30] produces lines of questioning which confuse and unsettle the witness, because questioning is not designed with the witness's understanding or even participation in mind.[31] The answers become immaterial, the result being:

> "an affirmative and a negative answer may be almost equally damaging, and a perfectly honest witness may give a bad impression because he cannot answer directly, but has to enter on an explanation".[32]

If engaging the witness is not the focus, the court is not assisted.

The importance of clear communication to encourage accurate witness memory retrieval has been indicated in research focusing upon police interviewing techniques.[33] Interviewing techniques used by investigators are often criticised as unfairly shaping witness testimony or adducing information by means rendering it inadmissible.[34] Studies aimed at improving investigative interviewing and questioning techniques, and witness training programmes, developed particularly in England,[35] have found that:

> "whilst much attention has been paid to the research and improvement of pre-trial procedures, less has been afforded to investigating those optimum conditions required for

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[29] Jeremy Curthoys, Christopher Kendall, *Advocacy: An Introduction* (LexisNexis Butterworths 2006), 7.

[30] This makes examination-in-chief more difficult.

[31] See generally Caruso, "I Don't Want to Play Follow the Leader: Reforms for the Cross-Examination of Child Witnesses and the Reception and Treatment of their Evidence: Part 1" (Paper presented at the Australian Institute of Judicial Administration Conference on Criminal Justice in Australia and New Zealand, Sydney, Australia, September 9, 2011) <http://www.aija.org.au/Criminal%20Justice%202011/Papers/Caruso%20Pt%201.pdf> accessed November 1, 2011.

[32] A.G. Walker and N.M.L. Walker, *The Law of Evidence in Scotland* (William Hodge & Co. 1964), 361.

[33] See R.P. Fisher, R.E. Geiselman, D.S. Raymond, "Critical Analysis of Police Interview Techniques" (1987) 15(3) Journal of Police Science and Administration 177.

[34] See Ralph N. Haber, Lyn Haber, "Experiencing, Remembering, and Reporting Events" (2000) 6(4) Psychology, Public Policy and Law 1057; Karen Saywitz, Lynn Snyder, "Improving Children's Testimony with Preparation" in G.S. Goodman, B.L. Bottoms (eds), *Child victims, child witnesses: Understanding and improving testimony* (Guilford Press 1993), 117, 122.

[35] See *post*, esp. Part IV.

> witness accuracy within the courtroom process; and in particular, when witnesses are subject to cross-examination".[36]

Pre-trial research suggests that "standard legal procedures such as those employed during cross-examination might not provide the maximal conditions in which accurate testimony can flourish".[37] Leading questions are a key reason for this. Research undertaken in the context of eyewitness evidence indicates that leading questions can be detrimental to, and interfere with, eyewitness accuracy.[38] Unsurprisingly, the same research demonstrated that confusing questions have a negative impact upon witness accuracy. Leading questions are often a source of confusion.[39] That is because "an easy way of contaminating someone's memory of an event (that is, introducing errors) is to ask him or her a leading question which suggests a false fact relating to the circumstances of the original incident".[40] Leading questions make the task of cross-examining children "like shooting rats in a barrel … it is easy to confuse them and make out they're telling lies".[41] The interests of justice and the aims of the adversarial trial cannot be served if the form of questioning is designed to affect a witness negatively, rather than to test their recall.

Leading need not approach harassment or badgering for it to have an adverse effect on the value of the witness's evidence. Research indicates that the changing of a single word in a proposition can affect subsequent responses.[42] Whilst the substance of the question is the same, for a witness unfamiliar with and made anxious by court surroundings,[43] there may be a substantial difference in the

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36 Jacqueline M. Wheatcroft, Sarah Woods, "Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence" (2010) 14 International Journal of Evidence and Proof 187, 191.

37 *ibid.*

38 See *ibid.*

39 See *Johnston v. Todd* (1843) 5 Beav. 597, 601-2. See also Jacqueline M. Wheatcroft, Graham F. Wagstaff, Mark R. Kebbell, "The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy" (2004) 9 Legal and Criminological Psychology 83; Mark R. Kebbell and David C. Giles, "Some Experimental Influences of Lawyers' Complicated Questions on Eyewitness Confidence and Accuracy" (2000) 134(2) *Jou*rnal of Psychology, Interdisciplinary and Applied 129.

40 Andreas Kapardis, *Psychology and Law: A Critical Introduction* (2nd edn, Cambridge University Press 2003) 77.

41 Mark Brennan and Roslin E. Brennan, *Strange Language: Child Victims under Cross-Examination* (2nd edn, Charles Sturt University Press 1988) 3.

42 Elizabeth F Loftus and John C Palmer, "Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory" (1974) 13 Journal of Verbal Learning and Verbal Behaviour 585.

43 Robyn Layton Q.C. (Chair, Review of Child Protection), *Our Best Investment: a State Plan to Protect and Advance the Interests of Children* (South Australia, March 2003), 15.10.

effect of asking: "Are you lying?" as compared with "You're lying…[aren't you?]".[44] This difference is exacerbated for a complainant – and all the more for a child complainant, who is more likely to be influenced and reactive to aggression, or even heavy-handedness, by adults (especially adults in the garb of counsel[45]). The "style" – what I am terming the *form* – of leading questions is more likely to be "firm" than "friendly," and studies have indicated that re-questioning with a firm approach is more likely to result in interviewees altering initial responses.[46] This effect was increased when the questioner manipulated the information and the interviewee believed the questioner to be a person in authority.[47]

Leading allows an aggressive style and tone to be taken by the cross-examiner. It facilitates a view of cross-examination as emotionally traumatic, legitimated bullying that ignores and sacrifices children's rights and interests.[48] However, the question is whether leading is a sound device for achieving the principal fact-finding aim of the trial process. If leading questions are the best means to elicit facts from a witness, let them shed tears. The point is that leading questions do not always facilitate, and can frustrate, the fact-finding aim.

A recent psychological study examined the effect of non-directive and directive leading questioning styles on witness accuracy and confidence.[49] Both styles were leading in that the questions suggested an answer, but the directive style replicated the leading typical of cross-examination. The questions were drawn from court transcripts and took the form: "The young woman who answered the door had long hair, didn't she?". They thereby prompted the answer desired, whilst discouraging negative responses. The non-directive style, in contrast, suggested an answer but did not discourage disagreement, for example: "Was the street the white car turned into called Willow Street?".[50] Witness accuracy was at its greatest when the non-directive style was employed, with the directive

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44 See text at n.26, *ante*.

45 See Layton (n.43), 15.10.

46 See James S. Baxter, Julian C.W. Boon, Charles Marley, "Interrogative Pressure and Responses to Minimally Leading Questions" (2006) 40(1) Personality and Individual Differences 87.

47 See Rachel Roper, David Shewan, "Compliance and Eyewitness Testimony: Do Eyewitnesses Comply with Misleading 'Expert Pressure' during Investigative Interviewing?" (2002) 7(2) Legal and Criminological Psychology 155.

48 See Annie Cossins, "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?" (2009) 33(1) Melbourne University Law Review 68, 69-70, and the authorities cited in support of that discussion.

49 Wheatcroft, Woods (n.36).

50 *ibid.*, 197. See also n.24, *ante*, and accompanying text.

style having "detrimental effects on accuracy".[51] The study further examined the effect of witness preparation, given the growth of witness preparation services in the United Kingdom,[52] in counteracting the effect of leading. The findings are important to an assessment of whether pre-trial measures can usefully assist in improving the reception of child evidence, if current trial practices continue. The study found that:

> "where directive leading questions are incorporated into cross-examination procedure, and where such question types are permissible, a witness's overall accuracy will be reduced regardless of the type of preparation the witness receives".[53]

The study further found that cross-examination did not break-down a "confident veneer" of an untruthful witness,[54] as confidence accorded positively with a witness's accuracy and reliability: "the greater confidence a witness expresses to any given response (answer), then the more accurate those answers should be".[55] It was not a case of untruthful witnesses seeking to mask their falsehoods by the confidence of their answers, such that leading cross-examination was of utility in exposing the witness. To the contrary, leading had the effect of lessening the witness's confidence and thereby the accuracy of his or her evidence.

The problems with leading questions identified by this study are compounded by jury perceptions of witnesses asked leading as opposed to non-leading questions. In one jury study, 86 per cent of jurors believed the witness when he or she answered non-leading questions, but only 73 per cent believed the witness when the same questions were put in leading form.[56] Leading reduces the ability of the witness to give accurate evidence, and lessens the juror's willingness to accept that evidence. Leading frustrates the task of both the witness and the juror; whereas non-leading questioning produces more accurate testimony which, appropriately, is more readily accepted. As Heydon J. observes in *Cross*, the way in which a witness responds to examination-in-chief is often more informative about the witness's reliability than the witness' reaction to cross-examination. Assessments of credibility are also assisted by a non-

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51 *ibid.*, 203.

52 *ibid.*, 188. See further Part IV, *post*.

53 See Wheatcroft, Woods (n.36), 203.

54 Wheatcroft, Woods (n.36), 204; *cf.*, Hickey (n.14).

55 Wheatcroft, Woods (n.36), 205.

56 See G.L. Wells, R.C.L. Lindsay, T.J. Ferguson, "Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification" (1979) 64 Journal of Applied Psychology 440; see further R.C.L. Lindsay, G.L. Wells, F.J. O'Connor, "Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension" (1989) 13 Law and Human Behavior 333.

leading style, for "a witness's answers to non-leading questions reflect credibility well in that they are that witness's answers, not the answers of a legal adviser".[57]

A number of studies indicate that leading questions undermine the discovery of truth, for which cross-examination is praised, because they "can be detrimental to a witness's ability to express what he or she believes to be true".[58] If, as the Australian Law Reform Commission conclude, the trial involves "a serious attempt to reach conclusions about what occurred in the past",[59] and the "credibility of the trial system ultimately depends on performance … [in the] … fact-finding task of the courts",[60] that system cannot tolerate techniques that are proven to reduce a witness's ability to recall the past.

D. The particular problem for children

The allowance of leading questions in cross-examination exposes an assumption by the adversarial process that witnesses are best tested under unusual and stressful conditions. The Layton inquiry, which was concerned with the protection of children throughout South Australia, as well as in the court system, was told that:

> "Discrediting a child witness frequently involves confusing, intimidating and/or exhausting the child using a range of tactics. Some tactics precisely echo the dynamics of sexual abuse, such as the tactic of winning a child witness' trust with gentle friendly questioning and then attacking and accusing the child".[61]

Such techniques are particularly counterproductive when testing the evidence of children because children are highly suggestible and susceptible to the influence of others and prone to fantasy: suggestions and fantasies that can be all the more strongly put through leading questions.[62] Indeed, the courts have recognised that "children, especially younger children are vulnerable to leading questions in the course of interview or evidence".[63] This inclination to fantasy is supplied and encouraged by the cross-examiner, for:

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[57] John D. Heydon, *Cross on Evidence* (7th Australian edn, LexisNexis Butterworths 2004) 543, [17170].

[58] See Wheatcroft, Woods (n.36), 193, and the studies there cited at fn.31.

[59] See Australian Law Reform Commission, *Evidence* (ALRC 38, 1987), [32].

[60] *ibid.*, [46].

[61] See Layton (n.43), 15.14, citing Submission 129 from the Office of the Status of Women.

[62] *ibid.*, 15.16, referring to many of the works cited herein and in Caruso (n.31), esp. Pt II.

[63] *R. v. F.A.R.* (1995) 80 A.Crim.R. 358 (Queensland Court of Appeal), 368 (Fitzgerald P., Davies J.A. and Pincus J.A. agreeing).

> "children have the ability to distinguish between fact and fantasy, and the danger of a child fabricating allegations without the encouragement of an older person is minimal. However, children are suggestible".[64]

Studies indicate that the evidence of children is generally reliable, with little evidence that children "make things up" or supply falsehoods to conceal gaps in memory or knowledge.[65] That reliability in recall is frustrated by leading questions. As further noted by Fitzgerald P. in *R. v. F.A.R.*:

> "While children generally do not experience full cognitive development until about 14 years of age, children, even children of tender years, can give reliable evidence *if questions are tailored to their cognitive development*".[66]

It comes to this: "[a] nervous or frightened child is not the best way to adduce reliable and full information on the allegations".[67] A child in such a state is unlikely to impress a jury as to the value of their testimony.[68] Asking children leading questions is contrary to the fact-finding aims that underpin cross-examination, as they damage a source of evidence that is, generally, reliable.[69]

Leading questions are by no means the only tactic that might derail or upset a child. The trial alone can do that. Children who are witnesses in a criminal trial have to cope with the significant anxiety associated with giving a detailed account of their experience, which has already provoked anxiety. Elevated anxiety can interfere with concentration, making it harder to access memory. It can also make the child less motivated to recall the event.[70] Avoidance and dissociation – natural ways for the child to manage that stress – can result in them responding to questions in a manner that appears indecisive or indifferent, which adversely affects their credit and apparent reliability.[71] However, those factors should not be allowed to conceal the effect of leading itself. In the search and discovery of what Wigmore would term the "truth", we may take heed of Vice-Chancellor Knight Bruce's warning and consider whether that pursuit

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64 *ibid.* See further, Coyle *et al.* (n.15), 146.

65 See Susan McNichol, Rosalyn Shute, Alison Tucker, "Children's Eyewitness Memory for a Repeated Event" (1999) 23(11) Child Abuse and Neglect 1127.

66 *F.A.R.* (n.63), 367 (emphasis added).

67 Layton (n.43), 15.10. "A mind rudely assailed … naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses": *Elliott v. Boyles* (1857) 31 Pa 65 (Supreme Court of Pennsylvania), 66.

68 See Caruso (n.31), Part II.

69 See Caruso (n.31), esp. Part II.

70 See Layton (n.43), 15.13.

71 *ibid.*, and the submissions there cited.

may be "loved *unwisely*" and pursued "*too keenly*"[72] if sought through leading questions, for psychological research shows the elicitation of truth by such means, and under the conditions leading creates, to be unlikely, and unreasonable to expect.[73]

E. The current model: judicial control of cross-examination

It is for the trial judge to ensure that cross-examination is conducted appropriately and in accordance with the principles and rules of the common law,[74] so as to ensure a fair trial.[75] Protecting a complainant against improper cross-examination is "part of the concept of a fair trial – one that is fair to the complainant, the accused and the community".[76] Legislation which permits the presiding judge to restrict leading questions[77] was enacted with child witnesses in mind, the age of the witness being an express consideration for the court in determining whether to disallow a leading question under the provisions.[78] Such legislation, however, fails to take into account the fact that an adversarial system will disincline[79] judges to intervene[80] in counsel's carefully prepared, strategic cross-examination, particularly where they are questioning an accuser on behalf of the accused.[81]

It must also be noted that the power to restrict leading is not the product of statute, nor exclusively now confined to statute.[82] The common law power of the trial judge to control cross-examination always extended to restricting leading questions in appropriate cases.[83] Those cases often arise in the civil context where, for example, multiple parties are involved and a witness shows partisanship

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72 *Pearse v. Pearse* (1846) 1 De G. & Sm. 12, 28-9; [1846] 63 E.R. 950.

73 See Wheatcroft, Woods (n.36), 192.

74 See Caruso (n.31), Part III.A.

75 See *Libke* (n.13); *R. v. T.A.* [2003] NSWCCA 191, (2003) 57 N.S.W.L.R. 444.

76 Michael S. King, "Therapeutic Jurisprudence, Child Complainants and the Concept of A Fair Trial" (2008) 32 Criminal Law Journal 303, 306.

77 See s.42 of the uniform evidence law; see also *Mooney v. James* (n.2), 28; *Stack v. Western Australia* [2004] WASCA 300, (2004) 29 W.A.R. 526.

78 See Boyd, Hopkins (n.4), 158.

79 *Cf. R. v. T.A.* (n.75), 446, [8] (Spigelman C.J.).

80 See, *e.g.*, Jennifer Zhou, "Challenges in Prosecuting Child Sexual Assault in New South Wales" (2010) 34 Criminal Law Journal 306, 312.

81 See *R. v. Smallman* (1914) 10 Cr.App.R. 1 (Court of Criminal Appeal), 3; *Hally v. Starkey* [1962] Qd R. 474; *Doggett v. The Queen* [2001] HCA 46, (2001) 208 C.L.R. 343, 346; *R. v. Maslen & Shaw* (1995) 79 A.Crim.R. 199 (N.S.W. Court of Criminal Appeal), 204; *cf. Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson* [1983] C.L.Y. 1660 (High Court, Queen's Bench Division). See also Zhou (n.80), 313; Judy Cashmore, Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (N.S.W. Bureau of Crime Statistics and Research 2005).

82 Section 42 of the *Uniform Evidence Acts* "does not limit the court's power to control leading questions": s 42(4); see ALRC 26 (n.18), [632], and ALRC 38 (n.59), [115], [116].

83 See n.77, *ante*, and Caruso (n.31), Part III.A.

towards the party against whom that witness is called.[84] On the other hand, unrestricted cross-examination, at least as far as leading is concerned, is the norm in criminal cases,[85] particularly in cross-examining the accuser.[86]

The legislation, however, provides that leading questions are to be disallowed when "the facts concerned would be better ascertained if leading questions were not used".[87] As the studies indicate, the facts concerned *will generally be better ascertained* if leading questions are not used. The fact that such questions are not more routinely curbed by judges reveals the faulty premise of the law that leading questions assist in fact-finding.

F. The advantages of a "presumption–based" model

It is therefore not the absence of legal mechanisms or powers to control cross-examination that is problematic, but the extent to which the court's willingness to exercise control is limited by the nature of the adversarial contest and,[88] more importantly, a premise that cross-examination through the use of leading questions tests a witness's evidence in a manner productive to the trial process.[89] The legislation and the common law, in focusing on the judge's powers to disallow leading, take the wrong starting point. The starting point for effective reform is to change the attitudes and approach of counsel.[90] If power is to be given to the judge, it should be to *allow* a cross-examiner to lead, on the basis that there is good reason why leading is, in this case, necessary. A displaceable presumption[91]

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84 See *Kirk v. Industrial Relations Commission* [2010] HCA 1, (2010) 239 C.L.R. 531, 586-7 (Heydon J.); *Cheers v. El Davo Pty Ltd (in liquidation)* [2000] FCA 144; *Peabody v. Parkinson* (n.81).

85 *Cf. Stack v. W.A.* (n.77): the defence had not been allowed to ask leading questions in cross-examination of an Aboriginal youth, which direction was criticised as an error on appeal.

86 See Boyd, Hopkins (n.4), 160-2; Jenny McEwan, "Special Measures for Witnesses and Victims" in Mike McConville, Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press 2002) 237, 248.

87 Section 42(3) of the *Uniform Evidence Acts*.

88 See *Wakeley & Bartling v. R.* [1990] HCA 23, (1990) 93 A.L.R. 79, 86.

89 See Boyd, Hopkins (n.4), 157; Jill Hunter, "Battling a Good Story: Cross-examining the Failure of the Law of Evidence" in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart 2007) 265.

90 *Cf. Wakeley* (n.88), 86; Boyd, Hopkins (n.4), 157.

91 I will not expand on the rebutting of the presumption, other than to say the onus would be on the party seeking to cross-examine and particular circumstances would have to be shown, given the negative use and effect of leading discussed here. I avoid the trendy terminology of "special circumstances": a discretion to allow leading in the court is sufficient; additional adjectives need not fetter a discretion when the basis for that discretion is clearly known. The point is that blanket prohibitions are rarely useful or desirable: *cf.* Cossins (n.48), 99-100.

against the use of leading questions in cross-examination will serve to implement this change.

It is not intended to suggest that cross-examination is simply an exercise in leading a witness. Cross-examination that amounts to "a speech thrown into the form of questions"[92] is impermissible, as is the use of leading questions to "put testimony in the mouth of a witness".[93] Counsel employ a range of questioning techniques during cross-examination. Those techniques are to be commended when they are aimed at the search for fact, with which the trial system is concerned, and for which the power of cross-examination is praised.[94] Moreover, non-leading questions may upset one witness, whilst another may respond perfectly well to leading questions. Each case must be assessed, just as each witness. The proposed reform facilitates this.

The next two parts focus on the recognition and management of, and adequate responses to, the natural anxiety experienced by a witness in a criminal trial, regardless of the cross-examination techniques to which that witness is subjected. Leading compounds and exacerbates this anxiety, particularly in children retelling incidents of sexual abuse. It is, however, the primary technique employed in cross-examination. For the reasons just discussed, it should not be.

This article's first proposal would create a presumption against leading, capable of displacement at the judge's discretion, thereby facilitating a case-by-case approach.[95] Its focus is on the person with the greatest control over the techniques employed in cross-examination – the cross-examiner.[96] It requires no more than that leading questions be rephrased as non-leading – an easy change, as counsel are well accustomed to non-leading questioning. This will counter the negative effects which arise from the *form* of leading questions alone, without disturbing the substance of the questions being put. It will reduce the aggression of cross-examination, which is likely, in turn, to reduce the undue effect on a witness's evidence of the manner in which they are questioned. It will also make

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92 See Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan & Co. 1883) vol. 1, 431; John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003), 299-300.

93 See *Lever v. Goodwin* (1887) 36 Ch.D. 1 (E&W Court of Appeal); *Kizlyk v. Canadian Pacific Railway Co.* (1944) 51 Man.R. 33 (Manitoba Court of Appeal).

94 "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness": *Mechanical and General Inventions Co. Ltd v. Austin* [1935] A.C. 346 (House of Lords), 359.

95 See n.91, *ante*.

96 *Cf.* Wheatcroft, Woods (n.36), 193.

the witness the focus for the court: the witness will speak to the court, being searched for fact, with the cross-examiner as a facilitator and tester of that account, rather than substituting his or her own version for it. By avoiding leading questions, wherever possible, "the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained",[97] and even improved.

III. SECOND PROPOSAL: CONTEMPORANEOUS EXPERT ASSISTANCE

In *R. v. F.A.R.*, Fitzgerald P. concluded that "[t]he ability of children to give reliable evidence depends on complex interactions between life experiences and age-related factors such as recognition, recall, and articulateness".[98] His Honour arrived at that conclusion after studying the published opinions of a number of experts with respect to the reliability of children's evidence. He studied that material because, "[n]eedless to say, I am unqualified to form or express an expert opinion on the reliability of children's evidence, either generally or in particular cases, or on limitations or qualifications to that reliability".[99]

In endeavouring to ensure the child witness is not unduly, adversely affected by cross-examination, judges and counsel have no particular training or expertise to determine the effect that cross-examination is having on the child, and therefore the evidence.[100] There is a stark difference between the law defining certain questions or techniques of cross-examination as improper,[101] and actually determining when particular lines of inquiry or techniques are having an improper or adverse effect on a witness.[102] The court approaches what constitutes an improper question or technique against the background of training in, familiarity with, and adherence to the adversarial process, and the centrality of vigorous cross-examination in upholding the defendant's right to a fair trial. The conclusions that follow from that approach may be very different from the lines of questioning or cross-examination techniques that a person with specialised knowledge of, for example, child psychological development and behaviour would recognise and identify as having an adverse effect on a child and his or her ability to recall information, or to explain himself or herself properly and confidently. As can be seen from the discussion in respect of the first proposal,

97 *ibid*., 194.
98 *F.A.R.* (n.63), 367.
99 *ibid*.
100 See Layton (n.43), 15.14.
101 See Caruso (n.31), Part III.A.
102 See Boyd, Hopkins (n.4), 150.

these differing perspectives cannot be divorced, because the psychological impact that such specialists would detect has a real and marked influence on the ability of a child to provide reliable, credible and complete evidence to the court.

Anyone who feels his or her credibility and reliability are successfully being impugned is likely to become flustered and upset. The trial judge must decide whether the child is becoming upset for that reason, or because defence counsel is being unnecessarily abusive, or because the child has been giving evidence for too long, or because he or she cannot understand the question; the list continues. The combination of this article's first and second proposals is an effort, first, to minimise the extent to which the child witness will be treated in an unhelpful and counterproductive manner; and secondly, to assist judges in determining whether to intervene. This is to be achieved not simply by giving them powers to do so – powers which they already have – but information and assistance from trained experts.

A. Educational approaches

The need for greater education of the judiciary, and the bar, in the special difficulties experienced by children when giving evidence, and in particular in the effect of cross-examination, has been widely studied, and is accepted as key to improving the reception of child evidence by courts and the experience of child witnesses in courts.[103] Many have argued for greater acceptance of expert evidence in sexual assault trials involving child complainants, so that the court is informed of the psychological and behavioural science concerning the effect of cross-examination and the court room experience on the child.[104] These views not only reflect the sentiments in *R. v. F.A.R.* about the limited expertise of the court, but a desire to have a consistent approach to children's evidence. It was noted, following the consultation phase of the Layton report, that:

> "practices varied considerably as to the approach to cross-examination taken by counsel and or permitted by a judge. In the end, much depended on the sensitivity of the judge to the effect of the process of cross-examination on the child as to whether an inappropriate approach was permitted to continue".[105]

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[103] The Layton report recommended greater education and understanding: see Layton (n.43), 15.13-15.15.

[104] *Cf.* Coyle *et al.* (n.15), on the different but related subject of expert evidence to rebut allegations of sexual abuse against children.

[105] Layton (n.43), 15.14; see also Zhou (n.80), 311-2.

These proposals are directly aimed at a source of difficulties with child evidence,[106] namely, the limits on the court's ability to recognise and therefore respond to practices which are negatively affecting the witness, or indeed circumstances adversely affecting the witness's ability to give useful evidence. Although laudable, educational programmes and the provision of expert evidence cannot monitor, react to, and protect the child's state of mind *whilst giving evidence*, so as to elicit the best possible evidence.

B. Traditional approaches to expert evidence

As it stands, an expert witness may be called to give evidence on a child's state of mind. To the extent that expert evidence appraises directly the particular child's evidence,[107] it is a commentary on it. Expert evidence given *after* the child, even as a commentary on its testimony, does not help the court to determine, at the time the child is giving evidence, the effect of the trial process on the child, so that it may take remedial action to improve the quality and value of the evidence. Indeed, it may well produce further, unhelpful critiques in trying to second guess the motives or reasons behind a child's testimony.

On the other hand, proposals that suggest that an intermediary analyse all questions *before* they are asked lead to significant interference with cross-examination, taking its control out of the hands of counsel.[108] They are impractical, and should be of last resort.

C. The expert as independent assistant to the court

This article, instead, proposes using the expert in a way that permits contemporaneous action to be taken by having the expert act as an independent assistant to the court whenever the child is giving evidence. This would be preferable, even where the evidence is pre-recorded because, putting aside the issues arising in respect of pre-recorded testimony, that testimony is still elicited by the usual processes of examination.[109] The expert would be able to inform the court of any circumstances about the child which may not be apparent to an untrained person, but which should be taken into account in assessing the status of the witness and the quality of the evidence. Monitoring the child's condition also recognises that other

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[106] See generally Caruso (n.31), on the failure of current and recent reforms to address the actual problems.

[107] Sections 79(2)(b) and 108C(2)(b) of the uniform law permit general expert evidence; it need not be tailored to a critique of the particular child.

[108] *Cf.* Cossins (n.48), 101-4.

[109] *Cf.* Coyle *et al.* (n.15), 152-3.

factors than the questions being put may affect the child.[110] The system proposed is reactive, as the expert could also offer advice as to the appropriate response that may be warranted, given the status of the child and the particular difficulty faced. It would offer an answer to the heavy and unsatisfactory reliance on lawyers to identify and address difficulties the child experiences in facing these questions – matters in which they are untrained.[111]

D. The need for contemporaneous assessment

Studies suggest that one reason for the continued use of improper questioning by lawyers, and the failure of legislative reform that places a duty on the court to disallow such questioning,[112] is simply that counsel are neither aware of the problem, nor perceive that their questions are improper.[113] This stems from the adversarial trial with which they are familiar, and by which they are guided. However:

> "Whether a question is or is not confusing cannot be answered by reference to the adversarial system of trial. It is a question best answered by those with knowledge of child development and linguistic competence, or for that matter, by the child in question".[114]

An adversarial approach to the effect of questioning may conclude that a child's negative reactions to a psychologically deleterious line of questioning merely displays nervousness or evasiveness as a witness, and is simply the product of not faring well in questioning. But, as the Layton reported noted, a child may exhibit signs which might cast doubt on the credibility or reliability of an adult, but which, in a child, indicate a need to intervene to protect the child from a situation in which his or her resolve is being tested, rather than his or her evidence:

> "Children within a criminal trial have to cope with the significant anxiety associated with giving a detailed account of their experience, which has already provoked anxiety. Elevated anxiety can interfere with concentration, making it harder to access memory and can impair motivation for the event to be recalled. A common coping mechanism for managing anxiety is avoidance or dissociation which, if it

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[110] *Cf.* Cossins (n.48), 101-4, whose fifth proposal appears limited to the effect of questions.

[111] Layton (n.43), 15.14.

[112] See Caruso (n.31), Part III.A.

[113] "[T]hose responsible for asking the questions, objecting to them or disallowing them were unaware of the level of confusion and trauma being experienced by children in the witness stand": Boyd, Hopkins (n.4), 164.

[114] *ibid.*, 163. The child is also in a "rather good" position to assist: see Part IV, *post*.

> occurs in the context of a criminal trial, can result in the child being viewed as indecisive or indifferent, thus diminishing their credibility".[115]

The assistance of experts would ensure those with appropriate training are making decisions about whether a child's condition is adversely affecting the ability to give evidence. It would mean a certain consistency of approach, for experts engaged in this task would likely have similar qualifications and training (there would not be the risk of a judge having missed a training session) and constitute a fairly small pool.[116]

E. Reforms to date

Reforms made by the *Statutes Amendment (Evidence and Procedure) Act* 2008 (S.A.) in South Australia provide for the use of expert evidence in determining any "special arrangements" the court might make,[117] rather than confining it to substantive issues arising in the trial. This acknowledges the limits of the court's expertise, and the need for expert assistance in determining appropriate arrangements.[118] Such evidence helps the fact-finding tribunal in trying the evidence, not the witness, by establishing the conditions most likely to promote the giving of high-quality evidence.[119] This article's second proposal is a further, and logical, extension of using expert evidence to determine the appropriate arrangements under which the witness should give evidence: if expert evidence is used to determine what arrangements to make, surely experts should be used to determine if these arrangements are working.

Western Australia might be seen to have led the way with its approach to child evidence. Section 106F (and s.106R) of the *Evidence Act* 1929 (W.A.) allows for the appointment of a child communicator to assist as an interpreter for a child, in appropriate circumstances. Similar provisions exist in South Africa[120] and England and Wales.[121] The Layton report recommended that section

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115 Layton (n.43), 15.13, citing Submission 169, from Action for Children SA.

116 As with experts who provide reports concerning mental impairment relevant to criminal proceedings.

117 See the *Evidence Act* 1929 (S.A.), ss.13(3) and 13A(9).

118 As indicated in *F.A.R.* (n.63).

119 See Part II, *ante*.

120 See *Criminal Procedure Act* 1977 (R.S.A.), s.170A.

121 See *Youth Justice and Criminal Evidence Act* 1999 (U.K.), s.29, which provides for a special measures direction permitting the examination of the witness to be conducted through an interpreter or other person approved by the court. The intermediary is to communicate and explain to the witness the questions put to the witness, and to communicate and explain to the court the answers given by the witness.

106F be implemented and extended in South Australia.[122] This point will be addressed further in the context of this article's third proposal; however, these provisions are positive, in that they facilitate a child witness's understanding, and thereby promote more reliable evidence. The protection of the child witness, and the elicitation of best evidence, are not separate considerations: to have one is to have, or at the very least support, the other.[123] Nonetheless, communicators, like interpreters, are always used out of necessity rather than desire. Something is always lost in translation or reinterpretation by a communicator. Proposals recommending reform in New South Wales (and recent calls for similar reform in South Australia) in accordance with the Western Australian and South African provisions seem to establish the communicator as an intermediary who assumes the role of both the communicator, and the expert assisting the court on the cognitive and psychological difficulties the child might be facing.[124] Those roles are separate, and should be seen as such, because they involve differing degrees of interference and communication with the witness. This article's second proposal, to have an expert assist the court, is a step preliminary to a communicator. It leaves the child to respond to questions, but subject to greater scrutiny of his or her condition. If the expert thinks the court should intervene, and the court agrees, the appointment of a communicator may well be the appropriate response (although, hopefully, one of last resort). The expert could assist on this question.[125] The first step should be one of supervision,[126] rather than direct intervention by way of a go-between communicator. This would best preserve the principle of orality, and the advantage of direct communication by counsel and the court with the witness.

F. Multiplying the grounds for appeal?

It will of course be argued that having such an expert opens additional grounds of appeal by a convicted defendant. Four factors militate against this argument.

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122 Layton (n.43), Recommendation 104.

123 *Cf.* Andrew Palmer, "Child Sexual Abuse Prosecutions" (1997) 23(1) Monash University Law Review 171, 193.

124 See Zhou (n.80), 313.

125 As in the case of *Evidence Act* 1929 (S.A.), ss.13(3) and 13A(9), where the expert might recommend that the witness have a friend accompany them, in accordance with ss.13(2)(e) or 13A(2)(e), respectively.

126 *Cf.* Cossins (n.48), 101-4, whose proposal requires that all questions first go through an intermediary.

First, preventing questioning which confuses a child or otherwise has an adverse impact on him or her "does not require the balancing of the child's interests against those of the accused in securing a fair trial … it requires only judicial appreciation of the fact of the child's confusion".[127] That is what the expert does: assist the court to appreciate the child's condition. Improvements in monitoring and reacting to child witnesses so as to elicit testimony from them under the best conditions possible do not detract from, but promote the objects of a fair trial.

Secondly, whilst this reform may see a judge take advice from an expert and potentially interfere with a cross-examination as a result, it must be remembered that the judge gains no additional power; all that is changed is the information on which the judge acts. That is, if a judge is advised by the expert to intervene, the judge, under the present rules and duties of common law and statute, should likely have intervened of his or her own motion. If that intervention is inappropriate, it can be the subject of appeal. But the expert's assistance does not make the intervention appealable; an inappropriate intervention does. The expert simply offers, but the decision remains that of the judge. If anything, the expert's assistance should lessen, not increase, inappropriate intervention by a trial court, and commend to an appeal court that the presiding judge had the benefit of expert help in determining whether intervention was warranted.

Thirdly, that the judge should have the benefit of assistance from the expert in monitoring the child accords with the studies discussed above, and is fundamentally based on the recognition and acceptance of the fact that the skills and knowledge required to monitor the child witness are not wholly within the expertise of the judge. The judge's training is in the law. The majority of controls the judge exerts over proceedings (adjournments, rulings on points of law, interposing witnesses, discretionary exclusions, formulating directions) are based on legal principle, and are to be determined on the basis of experience in the law and its practice. Different skills are needed to monitor children. The question of whether control should be exercised over the course of a cross-examination where a child is giving evidence often arises from a consideration of the psychological effect a particular situation or event is having on the child. To accept that a judge would benefit from assistance in this task is not to open the floodgates: a judge's responsibilities, in the main, rely on legal expertise and experience. The child witness presents an anomaly where expert help is needed because, whilst the controls available to the judge are powers at law, questions of whether to exercise the

[127] Boyd, Hopkins (n.4), 163.

powers, and in what way, are not answered by legal training or experience. An adult witness[128] has less need of such special consideration when being examined because expert assistance is not required to facilitate that testimony. The reform here proposed simply acknowledges the time and place at which the court needs the expert's assistance, having regard to the subject with which the court actually needs help.

Fourthly, the practical operation of this reform will ensure its efficiency, which in turn minimises the scope for appealable errors to arise from it. The expert could act in much the same manner as an associate to the judge, and could be positioned on the bench. He or she could then communicate with the judge unobtrusively. Should the expert have a particular concern, a note could be passed to the judge and, if the judge were so minded, the jury excused, or the point simply taken up with counsel or the child directly. These notes could be retained, or the concern read onto the transcript, for the benefit of appeal courts. The expert could be court appointed, or agreed between the parties. In either event, the expert can be regarded as an independent officer of the court: there to assist the court, not any party. The role and purpose of the expert could obviously be explained to the jury at the outset, in summation, and as often as required. The jury, as on countless other topics, could be directed as to the reason for the expert, and warned against any adverse inference against the defendant – or the child. To reduce debate and build this in as customary practice, it should be presumed that an expert will assist the judge whenever a child gives evidence: as studies suggest that children often experience difficulty in the course of giving evidence, the expert's presence would seem to be a natural starting point. The presence of an expert could of course be waived by the prosecution (with the court's accession), or contested by the defence as a rebuttable presumption. The cost of the expert would be borne by the prosecution.[129]

Proper implementation and use of this reform will benefit all affected parties, will address long-experienced difficulties and the reasons for them, and will be a positive improvement to existing practice. Improper use of this reform (however so) will result in appealable error. That is entirely appropriate and unremarkable: it is certainly no basis to resist a reform which used properly would have beneficial effects.

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[128] Of sound mind.

[129] A case could be made that the cost should be borne by the judicial administration authority, so as to be rightly perceived as independent. However, the duty of impartiality owed by Australian prosecutorial services and all experts before Australian courts, should not mean funding for the expert is inconsistent with independence.

IV. THIRD PROPOSAL: EMPOWERING THE WITNESS

This article's final proposal is that the judge should ask the child to alert the court to any difficulty or distress he or she is experiencing. It must be acknowledged that this is already the practice of many judges presented with a child witness, and indeed this practice is often supported by counsel, who will suggest to child witnesses that they should indicate if they do not understand a question. As such, this proposal is in many respects a formalisation of what already happens. This would promote consistency and good practice.

The presiding judge should direct the child at the commencement of the examination-in-chief and cross-examination. Additional directions may be appropriate each time the child resumes testifying, so as to ensure that the child is appraised and reminded of his or her right to alert the court to any difficulties being experienced. The child may alert the court verbally or by raising a hand – or any method sufficient to gain the attention of the presiding judge. The judge can then, with the benefit of assistance and advice from the expert (if the proposal discussed in Part III is adopted), determine whether action should be taken, and what form it should take. It may be dealt with by directing the question to be rephrased; it may require the jury being taken out so as to consider the status of the child more fully; an adjournment may be appropriate; or it may be that the child simply needs to be reminded of the obligation to answer questions. As with the second proposal, the jury should be instructed regarding any adverse inferences against the defendant, or child, as a result of the directions to the child.

The purpose of formalising directions to ensure child witnesses know they can say if they feel uncomfortable or are experiencing difficulties is based on the studies indicating, and judicial acknowledgement of, children's greater reluctance to indicate uncertainty, and their submissive tendency in the face of questioning by advocates in the court environment. Adult witnesses will often ask the cross-examiner to rephrase a question that is not understood. A child will be far more reluctant to question the question.

This approach acknowledges that the child is best placed to alert the court to any difficulty he or she is facing. Emphasising and explaining to child witnesses that the court is grateful to know of anything which is troubling them, preventing them from being able to comprehend what is asked of them, or from communicating what they wish to say, will help build their confidence in the trial process, and likely reduce the need for communicators or other intermediaries. As with the second proposal, any issue the child does raise falls to the judge for final determination of what, if anything, is to be done. Alerting and reminding the child of this right is simply, as is the

expert assistance, a mechanism to help the officers of the court realise if there is a need to act.

That the child witness should be so directed by the judge is a logical extension of the informal advice given by those representing child witnesses (most likely witness support officers in the prosecutor's office) and the more formalised witness-training courses which are gaining momentum and endorsement from the courts of England and Wales.[130] These programmes "identify standard tactics used by lawyers during the course of cross-examination and … provide witnesses with practical advice on how best to approach the interaction".[131] Witnesses are trained with respect to "the basic rationale of cross-examination (*i.e.* to discredit opposing testimony) and directed to listen carefully to questions, *to request clarification where appropriate* and *never to answer a question they do not understand*".[132] Underlying this advice and preparation is the knowledge and acceptance that common courtroom questioning techniques can cause confusion and militate against the provision of complete and accurate testimony in legal proceedings. That environment, the former New South Wales D.P.P. remarked, requires witnesses to be prepared as soldiers for a battle.[133]

Putting aside dramatic overtones, what the growth and approval of witness training show, for present purposes, is that all witnesses must keep in mind the need for their proactivity in the face of questioning which causes them difficulties. This problem, and this need, are compounded in children. If witnesses are being trained to this effect outside the courtroom, it is fair and reasonable that they have the benefit of advice and reminders to that effect in the courtroom. As Jacqueline Wheatcroft and Sarah Woods suggest:

> "It is of utmost importance therefore that the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained. Accordingly, the pre-trial process needs to ensure that witnesses are aware of what is expected of them in the courtroom, *i.e.* that they be given information about the procedure, be offered the opportunity to ask questions, and be placed at ease".[134]

The courtroom will always present a formidable and upsetting environment for the child;[135] the very nature of the topic they are there to discuss does so, without more. One cannot eradicate this

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130 See *R. v. Momodou and another (Practice Note)* [2005] EWCA Crim 177, [2005] 1 W.L.R. 3442.
131 Wheatcroft, Woods (n.36), 188.
132 *ibid.* (emphasis added).
133 Cowdrey (n.12).
134 Wheatcroft, Woods (n.36), 194.
135 See Zhou (n.80), 310.

negative experience for the witness, but the aim must always be to minimise their discomfort. This third reform is another mechanism to minimise the difficulty of the courtroom experience, and therefore to elicit evidence in what experts in the field suggest are the best possible conditions. It directly addresses the problem of child witnesses feeling helpless, confused and isolated in examination: it can empower them by telling them that there is nothing to be ashamed of, and no problem in them alerting the court to the fact that they are having difficulty. That information is of assistance to the court *and the examiner*, if evidence of the best quality and value is to be elicited.

This third proposal has four features which commend it: it is practical, easy, cheap and effective.

V. CONCLUSION

Nothing in this article should be taken to undermine the importance and usefulness of continuing education. A call to the bar, or an appointment as a judge, does not necessarily bring with it an understanding of, or empathy for, child witnesses. Similarly, additional resources to lessen the impact of the courtroom experience for children will assist.[136] Most importantly, and with particular regard to the discussion of the reliability of child witnesses in Part II, it is not suggested that the criminal justice system should somehow be more trusting of child witnesses.[137] Cross-examination and scepticism regarding accusations are fundamental to the adversarial process, and are the best method available for testing the evidence to determine its truth. This article's proposals are offered with a view to ensuring advocates go about the task in the optimal way, and ultimately, that the aims of the methods employed actually accord with the laudable goals of the criminal justice system, rather than some ulterior purpose which is, in fact, contrary to the aims of criminal justice.

[136] And are needed, even on present reforms: see the *Evidence Act* 1929 (S.A.), ss.13A-13D.

[137] For the dangers of so doing see Coyle *et al.* (n.15), 140-1.

JURISDICTION SPOTLIGHT: CANADA

*THE HON. JUSTICE DAVID M. PACIOCCO**

I. OVERVIEW OF THE CURRENT STATE OF CRIMINAL JUSTICE IN CANADA

Since the *Canadian Charter of Rights and Freedoms* was proclaimed in 1982,[1] criminal law and procedure in Canada has been dynamic. During the first part of this period – until 9/11 – most legal developments were focused on securing citizens' liberty. Things have now changed. Canadian criminal law is now experiencing either a retrenchment, or a rationalization, depending on one's perspective. *Charter* decisions are becoming more guarded. More importantly, since 2006, the Government of Canada has been pursuing a self-styled "get tough on crime" programme. This is so in spite of falling crime rates.[2] Whether because of collective disgust over new criminal opportunities created by globalization, internet communications or organised crime; fear of terrorism; revulsion by an equality-seeking public over sexual exploitation that receives extensive media treatment; or the rejection of the *Charter*'s liberal vision in a global era of conservative politics; the criminal law is now being applied in Canada with a less indulgent attitude than in the past.

II. THE CANADIAN CRIMINAL JUSTICE SYSTEM

A. Substantive Criminal Law

In Canada, only the Federal Government has the jurisdiction to create criminal offences.[3] Canada's ten provinces and three territories lack the jurisdiction to do so, and, with the exception of contempt of court, Canadian courts are prohibited from creating common law offences.[4] By contrast, courts are free to create or modify common law defences.[5]

This simple description of the jurisdiction to create crimes is accurate, but masks two important realities. First and inevitably, "common law" or judge-made principles continue to exert a dramatic influence on the definition of crime. For example, although the *Criminal Code of Canada* contains highly specific provisions defining

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1 *Canadian Charter of Rights and Freedoms*, Being Part of the *Constitution Act* 1982, enacted by the *Canada Act* 1982 (U.K.).

2 Statistics Canada, "Police Reported Crime Statistics" <http://www.statcan.gc.ca/daily-quotidien/110721/dq110721b-eng.htm> accessed November 20, 2011

3 *Constitution Act* 1982, s.91(27).

4 *Criminal Code of Canada*, s.9.

5 *Criminal Code of Canada*, s.8(3).

"consent" for assault and sexual assault offences,[6] Canadian case law has augmented those definitions by holding that, even though nothing in the *Criminal Code of Canada* says so, there will be no valid "consent" even where there is agreement by the victim, (1) if the accused person intends to and does cause serious bodily harm;[7] (2) if the accused engages in unprotected sexual intercourse without disclosing his or her HIV status;[8] or (3) where the victim is touched sexually whilst unconscious.[9] Judicial reasoning has informed these developments far more than statutory language.

The *Charter*, with its judge-driven interpretations, has also exerted heavy influence on the interpretation of criminal legislation. Where there is more than one plausible interpretation, *Charter* values will be consulted to help assign meaning.[10] For example, the interpretation of "obscenity," in Canada, changed post-*Charter* to permit greater freedom of expression and association, as guaranteed by the *Charter*,[11] and the defence of corrective force against children by parents and guardians has been abridged to recognize constitutional values.[12]

Canadian practice has therefore blurred the line between interpreting legislated offences, and using judicial reasoning to create offences or alter criminal legislation.

The second reality that qualifies the jurisdictional propositions described above is that, like the Federal Government, Canadian provinces and territories do have the constitutional authority to create regulatory, non-criminal offences. Many of those offences carry heavy

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6 *Criminal Code of Canada*, ss.265(3), 273.1.

7 *R. v. Jobidon* [1991] 2 S.C.R. 714 (Supreme Court of Canada); *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339.

8 *R. v. Cuerrier* [1998] 2 S.C.R. 371 (Supreme Court of Canada).

9 *R. v. J.(A.)*, 2011 SCC 28, [2011] 2 S.C.R. 440; see Linda Richardson's case note, *post*, [2011] J.C.C.L. 309. The complainant agreed to be strangled into unconsciousness during sexual relations. Initially she claimed that she did not agree to the specific sexual act she found the accused to be perpetrating on her when she awoke. During trial her lack of consent prior to losing consciousness was not proved. The accused was nonetheless convicted. The Supreme Court of Canada reasoned that even if she agreed before losing consciousness, consent requires the continuing capacity to withhold agreement at any time, something impossible to do whilst unconscious. While the majority decision framed the outcome as an imperative of statutory interpretation, the reasoning is imbued with policy considerations.

10 *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, [62].

11 *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. As a result of concerns about impinging on the constitutional values of freedom of expression and freedom of association, the court replaced a more aggressive "community standards of tolerance test" for defining obscenity with a more halted "objectively determined harms" approach, which requires the Crown to prove that the conduct causes harm to designated interests.

12 *Canadian Foundation for Children, Youth and the Law v. Canada* [2004] 1 S.C.R. 76. As a result of concern about the constitutional right of children to security of their person the court crafted a limiting definition on the concept of corrective force to limit the defence.

penalties, some including terms in prison. There is wide ambit for creating such offences as there is no clear legal test for determining whether legislation has the punitive pallor of criminal law, or whether it is simply regulatory. Nor is there a meaningful content-based test for determining whether the exclusive domain of the Federal Government has been intruded upon by provincial or territorial legislation. The test for identifying criminal law asks only the dull question: whether legislation has a prohibition, a penalty, and a "valid criminal law purpose," which includes public peace, safety, order, health, morality or "other legitimate purpose."[13] Since provinces and territories can pass laws for the purpose of regulating property and civil rights in the province,[14] this test offers no meaningful limitation on provincial authority. In the result, provinces often pass legislation that prohibits conduct by penalty for what would easily be recognised as criminal law purposes. Both jurisdictions are heavily involved, for example, in impaired driving[15] and money-laundering legislation.[16]

B. Procedural Criminal Law

The structure of Canadian courts can be presented diagrammatically as shown on the following two pages.

The Federal criminal law power includes the authority to govern the conduct of criminal trials. This enables the Federal Government to legislate on criminal procedure, including the law of evidence. Recent legislation has reduced reliance on jury trials,[17] and has made the Canadian "preliminary inquiry" (where charges are confirmed or quashed depending on the sufficiency of evidence) a less important safeguard than it has been historically. Fewer accused persons qualify for preliminary inquiries and there are legislative initiatives designed to shorten these hearings.[18]

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13 *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, [74].

14 *Constitution Act* 1982, s.92(13).

15 See, for example, *Highway Traffic Act* 1990 (Ontario), s.48(2), imposing an automatic "administrative licence suspension" of three months for drivers who receive a "a warn" or "fail" on a roadside breath tests, indicative of a blood alcohol content in excess of 50 milligrams of alcohol in 100 millilitres of blood. This penalty is imposed before any criminal finding is made under the Federal jurisdiction and is justified as a matter of provincial authority as an administrative action related to regulation of the roadways.

16 See, for example, the *Civil Remedies Act* 2001 (Ontario).

17 In Canada, offences are either "summary" or "indictable." Only some indictable offences qualify for jury trials, and amendments have been made to a number of offences which permit prosecutors to elect to proceed summarily, removing the jury trial option.

18 The author discusses these developments in David M. Paciocco, "A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry" (2003) 48 Criminal Law Quarterly 1.

CANADIAN CRIMINAL COURT SYSTEM

Supreme Court of Canada

History: Created in 1875, but the Privy Council continued to have superior appellate jurisdiction until 1933 (criminal appeals) and 1949 (civil appeals). Now the final court of appeal for Canada (*Supreme Court Act* 1985, s.52).

Jurisdiction: Has an appellate criminal jurisdiction within and throughout Canada (*Supreme Court Act* 1985, s.35). Hears appeals from the Federal Court of Appeal or from the provincial courts of appeal where, in the opinion of the court that made the decision, "the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision" (s.37). May also itself grant leave to appeal a decision of those courts (s.40). May, in certain limited circumstances, hear appeals on a question of law from a lower provincial court or the Federal Court (s.38). The Governor-in-Council may refer important questions to the Supreme Court for decision (s.53). In criminal cases, the Criminal Code gives a right of appeal where acquittal has been set aside in the provincial court of appeal or where, in the provincial court of appeal, one judge dissents on a point of law.

Provincial courts of appeal

Jurisdiction: Each province or territory has a court of appeal to hear appeals from decisions of the superior courts and provincial courts. In some provinces there is a single court with a trial division and an appellate division, rather than a court of appeal and a superior court.

Federal Court of Appeal

History: Created in 2003 as a successor (alongside the Federal Court below) to the Federal Court of Canada. The Federal Court of Canada was itself created in 1971 as a successor to the Exchequer Court of Canada, created in 1875.

Jurisdiction: Decides appeals from the Federal Court (*Federal Courts Act* 1985, s.27). Has some limited criminal jurisdiction.

Federal Court

History: See the history of Federal Court of Appeal, *ante*.

Jurisdiction: Concurrent jurisdiction (with the provincial or territorial superior courts) in most cases in which relief is claimed against the Crown (*Federal Courts Act* 1985, s.17). Has some limited criminal jurisdiction, for example under the Criminal Code. Has some jurisdiction in relation to prisoners held in federal institutions.

Provincial or territorial superior courts

Jurisdiction: Each province or territory has a superior court with inherent jurisdiction to hear cases in areas not specifically limited to another court. The superior courts try the most serious criminal and civil cases; they also act as a court of first appeal for the provincial or territorial courts below. Provincial or territorial courts, or superior courts, can be designated youth courts, for young persons (12-17) charged with offences.

Provincial or territorial courts

Jurisdiction: Each province or territory (except the Nunavut Territory, where the Court of Justice deals with both territorial and superior court matters) has a provincial or territorial court to hear cases involving either federal or provincial or territorial laws. These courts have jurisdiction over most criminal offences, traffic violations, and provincial or territorial regulatory offences. They also hear all preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases.

The provinces also have a role to play in implementing the criminal law. They have constitutional jurisdiction over the administration of justice in their own province. In practice, most criminal prosecutions, including interim release applications, are in fact prosecuted by provincial prosecutors and tried by provincially appointed judges. All jury trials and some judge-alone (or "bench") trials for serious criminal offences are conducted by federally appointed judges, most often with provincial prosecutors. Federal prosecutors prosecute criminal tax and narcotics cases, as well as federal regulatory offences, leaving most criminal offences to be prosecuted by provincial prosecutors.

The Federal Government and the provinces also share jurisdiction over the enforcement of criminal penalties. The Federal Government administers sentences for those serving two years or more in custody in its "penitentiaries," while the provincial governments administer sentences of less than two years' incarceration in provincial "reformatories," as well as those sentences that are served in the community.

III. OVERVIEW OF IMPORTANT RECENT DEVELOPMENTS

A. Legislation

1. Getting tough on criminals

Since 2006, Canada's three successive Conservative Party governments have sponsored an unprecedented number of law and order bills. Many were passed, and those that could not be enacted by Conservative minority governments are expected to be reintroduced shortly in an omnibus crime bill, now that the Conservatives have a majority government. This "tough on crime" agenda marks a major policy shift for Canadian criminal justice. In 1996, when comprehensive sentencing changes were made to the *Criminal Code of Canada*, the emphasis was on "selective incapacitation." Criminal law amendments were designed to preserve incarceration as the sentencing option of last resort to be used only for those who pose a risk to society and who cannot be managed in the community.[19] In 1996, Canadian law also developed the "conditional sentence," in which offenders sentenced to less than two years in custody but who did not pose an unmanageable danger to the public could be permitted to serve their sentence conditionally in the community rather than in actual custody (often under house arrest or curfew). Provided they complied with conditions designed to reduce the risk of re-offending and to support their rehabilitation, offenders serving conditional

[19] See *Criminal Code of Canada*, ss.718-718.3.

sentences remain in the community.[20] In 1997, legislation advanced the selective incapacitation principle by enacting an accelerated parole regime that would see many of those who were sentenced for non-violent offences released into the community through "day parole" after serving as little as one sixth of their sentence.[21] "Long-term offender" legislation was also created to enable offenders who are considered likely to reoffend but who can be controlled by tight conditions to remain in the community instead of being ordered to long-term preventative detention as "dangerous offenders."[22]

The recent legislative initiatives are inconsistent with the policy of selective incapacitation. The most significant departure is the use of "minimum sentences," which require courts to impose a designated period of incarceration regardless of the circumstances of an offence or the degree of responsibility of the offender. Once used sparingly in Canada, minimum sentences now apply to more than 40 offences,[23] including murder, some alcohol driving offences, numerous firearm offences, and an increasing number of sexual offences, especially those involving children, with most proposed crime bills promising to add more. Legislation has been proposed to increase the number of child sexual offences carrying minimum sentences and to increase their duration appreciably;[24] to impose minimum sentences for aggravated forms of narcotics trafficking, importation or production;[25] to develop minimum sentences for immigration related human smuggling;[26] and to impose minimum sentences for repeat motor vehicle theft.[27] On the heels of a celebrated investment fraud case a minimum sentence has already been created for fraud over one million dollars[28] and new minimum sentences have been created for additional alcohol driving offences.[29] Some pre-existing mandatory minimum sentences (including for impaired driving and many firearms offences) have been lengthened.[30]

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20 See *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 for a judicial description of the legislation as it was enacted.

21 *Corrections and Conditional Release Act* 1982, s.125.

22 *Criminal Code of Canada*, s.753.1.

23 Robin Mackay, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-54, *Protecting Children from Sexual Predators Act*" (December 22, 2010) <www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library> accessed November 20, 2011.

24 2011, Bill C-54,"*Protecting Children from Sexual Predators Act*"

25 2009, Bill C-15, "*An Act to amend the Controlled Drugs and Substances Act*"

26 2011, Bill C-4, "*Preventing Human Smugglers from Abusing Canada's Immigration System Act*"

27 2009, Bill C-26 "*An Act to Amend the Criminal Code*"

28 *Standing up for Victims of White Collar Crime Act* 2011.

29 *An Act to Amend the Criminal Code* 2008, impaired driving causing bodily harm and impaired driving causing death.

30 *Tackling Violent Crime Act* 2008.

There has also been a retreat from the use of conditional sentences. When the legislation was passed, the only offences that were disqualified from conditional sentences were those carrying minimum sentences. For other offences, the legislation discouraged their lenient application by disqualifying cases in which the sentencing judge, applying the ordinary principles of sentencing, determined that a period of incarceration exceeding two years was required. The new trend now is to disqualify offences *ab initio* from the conditional sentencing option. In 2007 conditional sentences were disqualified for terrorism offences, organised crime offences, sexual assault offences, and "serious personal injury offences" (those involving actual or attempted violence, or those endangering life of safety) that carry potential penalties of ten years or more.[31] Then a bill was proposed disqualifying eligibility for conditional sentences for all offences carrying a potential penalty of 14 years (of which there are 75), all offences involving "bodily harm" carrying a potential penalty of ten years, as well as other listed offences including child luring, criminal harassment, trafficking in persons, and all breaking and entering offences.[32] This bill died when the last federal election was called in March 2011, but is expected to be passed in similar if not more aggressive form by the now majority Conservative Government.

Legislative initiatives are also designed to increase the amount of time individuals will serve in custody. As indicated, some existing mandatory minimums have been extended. Murder committed in connection with organised criminal activity is now "first degree murder" carrying the maximum sentence known to Canadian law of life without parole eligibility for twenty-five years,[33] and an Act has been passed to allow for consecutive life sentences for multiple murders,[34] effectively extending parole ineligibility past life expectancy for all but the youngest of multiple murderers. Legislation has also been tabled to remove the current option first degree murderers have of applying to have their parole ineligibility lowered after conviction, where the circumstances of the offender have changed since the offence occurred.[35] It has been made easier to secure "dangerous offender" designations that allow for the indefinite or long-term detention of offenders in the interests of public protection against apprehended future offences.[36] A bill has

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31 *An Act to Amend the Criminal Code (Conditions of Imprisonment)* 2007.

32 2010, Bill C-16, "*Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*".

33 *An Act to amend the Criminal Code (organized crime and protection of justice system participants)* 2009.

34 *Protecting Canadians by Ending Sentence Discounts for Multiple Murderers Act* 2011.

35 2009, Bill C-36, "*Serious Time for the Most Serious Crime Act*".

36 *Tackling Violent Crime Act* 2008.

also been proposed abolishing "accelerated parole," delaying release in a range of other circumstances, and making "the protection of society" the paramount concern of the correctional system.[37]

Most significantly, in real terms, the *Truth in Sentencing Act* 2009 has abridged the long-standing practice of Canadian courts of giving offenders "two for one" credit for time served after being denied bail while awaiting trial.[38] This practice existed in part to recognize that incarceration prior to conviction tends to be served in harsher conditions than post-conviction incarceration. The principal justification, however, related to parole eligibility. In Canada, federal convicts, on average, are paroled after one-half of their sentence. "Dead time" served prior to conviction does not count towards parole eligibility. The two-for-one credit therefore reduced the chance that those held in custody pending a delayed trial would not serve longer than they would have served, had their trials been held promptly.

Recent legislative initiatives are also designed to increase the long-term impact of convictions. Canadian laws permitting offenders to receive pardons have been tightened up. An act was passed increasing waiting periods, reversing the onus for obtaining pardons, and adding more restrictive criteria.[39] Under proposed legislation, it would also no longer be possible to obtain a "pardon" – instead, conditional "record suspensions" can be secured. When this legislation is enacted, periods of eligibility will be extended further, pardons will be easier to deny, and sexual offences involving minors will be absolutely ineligible, as will applications by offenders who have more than three indictable offences.[40]

The law has also been "toughened up" with the creation of increasingly aggressive offences. The age of consent for offences involving "non-exploitive" sexual activity with minors has been raised from 14 to 16 years of age,[41] while the cut-off age for offences that involve the exploitation of minors has been maintained at 18.[42] Three years ago child-luring was introduced as an offence,[43] and it is currently being augmented by provisions making it an offence to make sexually explicit material available to a child, and to agree or

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37 2011, Bill C-39, "*An Act to amend the Corrections and Conditional Release Act*".

38 *Truth in Sentencing Act* 2009.

39 *Limiting Pardons for Serious Crimes Act* 2010.

40 2010, Bill C-23B, "*Eliminating Pardons for Serious Crimes Act*".

41 *Tackling Violent Crime Act* 2008, sexual interference (s.151); invitation to sexual touching (s.152); bestiality (s.160(3)); luring a child (s.172.1); indecent acts (s.173(2)); and abduction of a person under 16 (s.280).

42 Sexual exploitation (s.153), child pornography (s.152), procuring sexual activity by a parent (s.170(a)), householder permitting sexual activity (s.171(a)), and child prostitution offences (ss.212(2)-213(4)).

43 *Tackling Violent Crime Act* 2008.

arrange to commit an offence against a child.[44] Offences have also been created making it illegal for internet service providers to fail to report to authorities that they have either received reports of child pornography on a site, page or email they administer; or that they themselves have reasonable grounds to believe their services have been used for such purposes.[45] New aggravated breaking and entering and robbery offences have been created where the offences involve the theft of firearms.[46] In addition, a raft of new offences has been proposed for identity theft.[47]

2. Increased investigative powers

Other recent and proposed legislative initiatives are aimed at extending investigative authority.

The most significant legislative initiatives address information technology. As the result of new legislation, internet service providers are now statutorily obliged to include interception capabilities in their networks at their own cost. They are also obliged to preserve the pages, sites or emails of anyone they are told or have reasonable grounds to believe may be committing child pornography offences using their service, and they are to report such information to the authorities.[48] Proposed laws will give designated police officers the authority to make without warrant "preservation demands" requiring service providers to capture and save suspect computer data. Similar "preservation orders" can be made by judges, and "production orders," can be obtained from judges requiring the active assistance of private individuals in obtaining transmission data and tracking data,[49] again at their own expense. These preservation and production orders can be secured if there are reasonable grounds to *suspect* an offence has or is occurring and that the information will be found. This is so even though the usual constitutional standard required for search warrants is reasonable grounds to *believe* an offence has occurred or is occurring and that the information will be found.[50] The justification offered for the more permissive standard of proof is that preservation and production orders are relatively nonintrusive because they do not disclose the actual contents of

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44 2011, Bill C-54, "*Protecting Children from Sexual Predators Act*".

45 *An Act Respecting the Mandatory Reporting of Internet Child Pornography by Persons who Provide an Internet Service* 2011.

46 *Tackling Violent Crime Act* 2008.

47 2009, Bill C-27, "*An Act to amend the Criminal Code (identity theft and related misconduct)*".

48 *An Act Regulating the Mandatory Reporting of Internet Child Pornography by Persons who Provide an Internet Service* 2011.

49 2010, Bill C-51, "*Investigating Powers for the 21st Century Act*".

50 *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 (Supreme Court of Canada).

private communications but instead give only identification and location information to assist search warrant applications for the private information itself. The actual searches for information must be based on reasonable and probable grounds to believe. This step-ladder approach in which permissive investigative standards are adopted relating to data that will be used to support ultimate search warrant applications is becoming increasingly common in Canadian law.[51]

There have also been important amendments to provide for more effective investigation of drug-impaired driving offences by permitting sobriety tests and by making it easier to obtain bodily fluids from suspects. Legislation has also made it more difficult to challenge the accuracy of breath testing results.[52] This latter initiative has had a profound impact on the defence of impaired driving cases. Previously it was common for accused persons to challenge the accuracy or readings with "evidence to the contrary" in the form of testimony disputing the alcohol consumption that would be required to achieve the breath analysis results. Subject to potential *Charter* challenges, such testimony is now an inadequate method of challenge.

Other legislative initiatives will make it easier for the police to use telephone number recorders to identify those phones that are used to communicate with an identified phone. This will become possible without warrant in urgent organised crime and terrorism investigations.[53] The Supreme Court of Canada decision in *R. v. Shoker*[54] has also been legislatively reversed, making it possible for those released on drug and alcohol conditions to be placed under conditions that will subject them to random and periodic testing of bodily samples.[55]

Legislation has also been introduced to resuscitate investigative anti-terrorism measures that had been adopted post 9/11 but allowed to lapse as unnecessary and unduly intrusive of civil liberties. This includes the "investigative hearing" found in section 83.28 of the

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51 "Reasonable suspicion" searches are now allowed to obtain access to financial account-holder information (*Criminal Code of Canada*, s.487.013), to identify phone numbers called (*Criminal Code of Canada*, s.492.2.), to track the movement of suspects (*Criminal Code of Canada*, s.492.1.), to conduct preliminary questioning of individuals detained for investigation (*R. v. Mann*, 2004 SCC 52, [2004] 2 S.C.R. 59), and for sniffer-dog searches in public places (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, as interpreted by *R. v. Schrenk*, 2010 MBCA 38, (2010) 255 Man.R. (2d) 12).

52 *Tackling Violent Crime Act* 2008.

53 2011, Bill C-50, "*An Act to Amend the Criminal Code (interception of private communications and related warrants and orders)*".

54 *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399.

55 *Response to the Supreme Court of Canada Decision in R. v. Shoker Act* 2011.

Criminal Code of Canada that permits witnesses to be subpoenaed before a judge for compelled investigative questioning under oath.[56]

B. Jurisprudence

1. Search and seizure

The *Charter* right to be free from unreasonable search and seizure depends upon the subject having a "reasonable expectation of privacy" relative to the search or seizure. There has been a recent trend in Canadian case law where searches do not interfere physically with the person or property of the subject to deny the existence of a reasonable expectation of privacy where the search technique used is relatively uninformative. The theory is that "dumber" forms of investigation yield very little specific information about the private affairs of the subject and therefore require no constitutional protection. Accordingly, there is no constitutional protection against the use of FLIR (Forward Looking Infra-red) devices,[57] used to detect heat patterns in a home, or suspicion-driven DRA (Digitial Recording Ammeter) searches,[58] used to measure electrical consumption patterns. These kinds of information tell us little about the personal life style choices of the inhabitants. Simply put, the fact that the police have used investigative techniques in an effort to secure incriminating information from a targeted subject does not mean that there has been a "search" within the meaning of the *Charter*; if those techniques are dull enough in what they reveal, section 8 rights do not arise.

2. The right to counsel

Attempts to expand the reach of the right to counsel have also been rejected in recent cases. The Supreme Court of Canada recently affirmed that individuals detained in Canada have the right to an initial consultation by phone with counsel, but no constitutional right to meet with counsel in person at the time of detention.[59] The Court reasoned that the purpose of the right to counsel secured by section

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[56] 2011, Bill C-17, "*Combating Terrorism Act*". This Bill also resurrects the "Recognizance with Conditions" found in section 83.3 of the *Criminal Code of Canada*, which had lapsed. This provision is a "peace bond" for terrorism suspects. It permits suspects to be arrested based on reasonable suspicion and to be released into the community on conditions designed to prevent terrorist activities.

[57] *R. v. Tessling*, 2004 SCC 67 [2004] 3 S.C.R. 432.

[58] *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211.

[59] *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R 310; *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429. See Andrew Bershadski, "A Trio of Cases, a Trio of Opinions: The Right of Access to Counsel in Canada's Police Stations, [2011] J.C.C.L. 170.

10(b) of the *Charter* is to enable detained individuals to become educated about their legal options so they can make informed choices about whether to cooperate with the police; the section does not confer a right to continuing advice on how best to respond to police requests. The court also introduced a *prima facie* "one call" approach; only where circumstances have changed materially does a right to receive further advice emerge.

3. Disclosure

Since 1991, Canada has adopted an aggressive disclosure regime requiring prosecutors to provide copies of the entire investigative file to the defence.[60] This disclosure is meant to enable the defence to prepare adequately, and to encourage guilty pleas. Only privileged information or material that is "clearly irrelevant" can be withheld.

The law is not so generous with information that was not gathered as the "fruits of the investigation" by the police investigators who prepare the file for the prosecutor. If the accused wishes to obtain access to information held by third parties, an application must be made to the court. In non-sexual offence cases, the accused must show that the target information is likely to be relevant. If this is shown, the judge will view the information and balance the competing interests, including privacy concerns, before deciding whether to order disclosure to the defence.[61] In sexual offence cases, a higher threshold exists. The judge must consider competing privacy and other interests before choosing even to look at material deemed likely to be relevant, and the balancing of competing interests after inspection is designed to give high regard to privacy interests and the encouragement of reporting of offences.[62]

Recently, the Supreme Court of Canada bolstered the disclosure and production regimes. It held that the Crown must include in its original disclosure package information about relevant misconduct by police officers on other occasions, if they played a material role in the case being tried. The court also recognized that prosecutors have an ethical and legal obligation to seek information that comes to their attention that is likely to be relevant.[63] This enables accused persons to co-opt the assistance of prosecutors in attempting to secure information likely to be relevant that is held by government agencies other than the prosecuting authority.

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60 *R. v. Stinchcombe* [1991] 3 S.C.R. 326 (Supreme Court of Canada).

61 *R. v. O'Connor* [1995] 4 S.C.R. 411 (Supreme Court of Canada).

62 *R. v. Mills* [1999] 3 S.C.R. 668 (Supreme Court of Canada), interpreting *Criminal Code of Canada*, ss.278.1-278.91.

63 *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

4. The Charter and the definition of murder

Recent appellate-level decisions have adopted a narrow interpretation of prior Supreme Court of Canada decisions that put limits on the offence of murder. Two decades ago, the Supreme Court of Canada abolished "felony murder," overturning legislation that supported murder convictions for individuals who kill unintentionally while committing serious offences in dangerous ways. The court reasoned that because of the stigma and the minimum life-sentence penalty a murder conviction carries, only those with subjective *mens rea* to kill can be convicted of the offence.[64] Some passages in those decisions invited the view that murder convictions could be based on nothing other than an actual intent to kill, or alternatively an actual intent to cause grievous bodily injury that the accused knew was likely to cause death. Recently, in *R. v. Shand*,[65] the Ontario Court of Appeal chose a more restrictive interpretation of those decisions, holding that these cases permit those who subjectively foresee that death is "likely" to result from their actions to be convicted of murder. The court therefore upheld a statutory provision that supports murder convictions for those who undertake, for an unlawful object, actions they personally know to be likely to cause death. It was therefore held to be appropriate to convict Shand of murder after the gun he pointed to subdue his robbery victims accidentally discharged. Given his choice to draw a loaded gun in a confined space to compel compliance, he must have foreseen that death was not just a possibility or chance but rather one of the likely outcomes.

Meanwhile, in *R. v. Briscoe*,[66] the Supreme Court of Canada endorsed the use of "willful blindness" – what the court called "deliberate ignorance" – as a *mens rea* that can support a murder conviction. Briscoe argued that he could not be convicted as a party to murder even though he intended to assist others in committing an offence when he drove them to a remote location with their victim. What made a murder conviction inappropriate, he claimed, was that he did not know at the time that his associates actually intended to kill the victim. He urged that in the absence of that knowledge he should be convicted solely of the lesser offence of manslaughter. The court disagreed. Provided Briscoe "strongly suspected" that those he intentionally helped would kill their victim and then deliberately chose not to inquire whether this was their plan, he was

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64 *R. v. Vaillancourt* [1987] 2 S.C.R. 636 (Supreme Court of Canada); *R. v. Martineau* [1990] 2 S.C.R. 633 (Supreme Court of Canada). The "appropriate conviction" in such a case is manslaughter, which carries a penalty that can be tailored to the crime and more adequately labels the offence.

65 2011 ONCA 5, (2011) 104 O.R. (3d) 491.

66 2010 SCC 13, [2010] 1 S.C.R. 411.

sufficiently culpable to justify a murder conviction. It was not necessary to conviction that he would want the victim to die, or even have actual knowledge that he was assisting in a murder.

5. The Charter and remedial retreat

Recent jurisprudence has also taken a more guarded approach to remedying *Charter* violations than was once the case. Supreme Court of Canada authority had held that "conscriptive" evidence (statements, bodily samples, and observations made of the accused when compelled to participate in re-enactments or line-ups) obtained during a police investigation had to be automatically excluded from evidence at trial if obtained in violation of the *Charter*, unless the Crown could prove that it would have found that evidence even without the *Charter* violation. In *R. v. Grant*,[67] the Supreme Court of Canada has now reversed itself, holding that this line of authority and the "fair trial" theory that supported it were too rigid. The exclusion of such evidence is now based on an evaluation of "all of the circumstances." Courts must consider whether admitting such evidence would be seen by reasonable people as unduly condoning the breach, or as trivializing the importance of the *Charter* right, bearing in mind the importance of the truth seeking function of the criminal trial. As a result, conscriptive evidence that once would have been readily excluded may well be admitted into evidence.

In *R. v. Bjelland*,[68] the Supreme Court of Canada took an even more limited view of the authority of courts to exclude evidence for non-investigative breaches. Courts are not, for example, to exclude evidence because its disclosure was late, unless there is no other remedy available and the admission of the evidence would compromise the integrity of the justice system. This is the same cautious test used in Canada for staying or stopping proceedings undertaken in abuse of process.

6. Sexual offences involving children

As the foregoing discussion reveals, Canada has taken an aggressive approach to internet-based sexual exploitation offences. Judicial interpretations strive to respect this policy. The recent case of *R. v. Levigne*[69] is illustrative. There, the Supreme Court of Canada upheld the conviction of a man of an internet luring offence designed to protect children, even though that man was communicating with an adult – an undercover police officer – and even though Levigne may actually

67 2009 SCC 32, [2009] 2 S.C.R. 353.
68 2009 SCC 38, [2009] 2 S.C.R. 651.
69 2010 SCC 25, [2010] 2 S.C.R. 3.

have believed he was speaking to an adult. This was so notwithstanding that the offence, section 173.1(1) of the *Criminal Code of Canada*, captures those who communicate with a child *or an adult whom the accused believes to be a child* for the purpose of facilitating a sexual offence. What entrapped Levigne was that the undercover police officer claimed during their online conversations to be 13. This triggered section 173.1(3), a provision that statutorily presumed Levigne to believe he was speaking to a child unless there was evidence raising a reasonable doubt to the contrary. Levigne tried to present evidence to the contrary by testifying that he honestly thought the subject was an adult who was only role-playing when "she" said she was 13 since "her" on-line profile showed "her" to be 18.[70] This attempt failed because section 173.1(4) holds that a mistaken belief in age defence cannot succeed unless the accused "took reasonable steps to ascertain the age of the person." The court held that even if Levigne did believe that the subject was 18, his reliance on the on-line profile alone was unreasonable. In the result, even though he was speaking to an adult and may have honestly believed he was speaking to an adult, Levigne was legislatively deemed to know he was speaking to a child, and was therefore guilty of the offence.

The case of *R. v. Legare*[71] also illustrates the point, again in the child-luring context. Legare had an internet conversation with a 12-year-old in which they spoke about engaging in sexual activity together. They made no arrangements to meet. The Crown accepted Legare's claim that he had no intention of actually committing a sexual offence with the child. The case therefore proceeded on an agreed statement of fact with the sole issue being whether section 172.1 of the *Criminal Code of Canada* captured Legare's conduct. The court held that it did. Section 172.1 makes it an offence to use a computer to communicate with a child "for the purposes of facilitating an offence." The Supreme Court of Canada recognised that the offence is meant to criminalize conduct that precedes the commission of sexual offences. It therefore interpreted the term "facilitate" broadly, holding that this offence could be committed even if Legare had no present intention of actually committing a sexual offence, provided that he intended to facilitate the commission of such an offence by grooming the subject so that she might be more easily lured in the future, should Legare be so minded.

The recent decision in *R. v. Morelli*[72] may be something of an "outlier" in the Canadian trend towards aggressively interpreting

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70 The undercover officer was a man.
71 2009 SCC 56, [2009] 3 S.C.R. 551.
72 2010 SCC 8, [2010] 1 S.C.R. 253.

sexual exploitation offences involving children. There, the Supreme Court of Canada held that someone would not be guilty of "possession of child pornography" even if they intentionally opened and viewed internet sites containing child pornography. The offence requires the possession of the underlying file, by storing images. The court reasoned that historically the concept of possession applied to things that can be transferred, and "without storing the underlying data … an image on the screen cannot be transferred."[73] What was most crucial to the decision is that the *Criminal Code of Canada* contains a separate offence of "knowingly causing child pornography to be viewed."[74] If possession of visual depictions alone was treated as possession, the viewing offence would become redundant.

IV. LAW REFORM

There is currently little organised criminal law reform in Canada. Between 1971 and 1993, the Law Reform Commission of Canada, which focused on technical reforms to existing areas of law, generated an impressive array of important and influential documents in the field of criminal law. Its successor institution, the Law Commission of Canada, founded in 1997, was less focused on technical improvements to existing law than engaging in broad dialogue about new legal directions, such as promoting a movement to "transformative justice". This body was abolished in 2006. There is now no standing law reform institution with jurisdiction over the criminal law. The current legislative agenda in Canada is driven almost exclusively by government policy.

V. OPPORTUNITIES FOR OVERSEAS LAWYERS

The Canadian federal system makes access to the legal profession in Canada complicated. The provinces have jurisdiction to regulate the legal profession, and, until recently, lawyers in one province could move jurisdictions only with great difficulty. Things have improved for domestic lawyers, as the result of reciprocal agreements between provincial statutory law societies – those independent bodies that regulate the legal profession in Canada. "Occasional" or temporary calls are also available, but only for lawyers who are members of other Canadian law societies.

Overseas lawyers, including Canadian students who have gained foreign degrees and wish to practise in Canada, have greater challenges. The Federation of Law Societies – an informal

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73 *ibid.*, [29].

74 *Criminal Code of Canada*, s.163.1(4.1).

association of Canadian law societies other than Quebec[75] – has created a body, the National Committee on Accreditation, which assesses foreign applications to determine Canadian equivalency.[76] Once this body grants candidates a Certificate of Qualification, they become eligible to enter provincial bar admission programmes. While these programmes vary, all provinces currently require a period of clerkship ("articles of clerkship") of up to a year, as well as the successful completion of bar admission exams, which vary in structure and focus between the provinces.

The National Committee on Accreditation permits those candidates whose training approaches Canadian legal education in subject areas and duration to acquire a Certificate of Qualification by passing examinations. The number of examinations imposed varies with the degree of equivalency the candidate possesses. Candidates with less comparable legal education may be required to attend a Canadian law school. Most receive some credit for their foreign studies, but some are required to undertake a complete three-year Canadian legal education.

[75] Quebec is the only jurisdiction in Canada where civil law is practised, and it has its own accreditation rules.

[76] See Federation of Law Societies of Canada, <http://www.flsc.ca/en/> accessed November 20, 2011.

CASE NOTES

SECURING A CONVICTION IN "CROSSFIRE" KILLINGS: LEGAL PRECISION *VS.* POLICY

R. v. Gnango [2011] UKSC 59, *The Times*, December 15, 2011 (December 14, 2011)
United Kingdom Supreme Court

Murder – Joint enterprise – Transferred malice

A. The facts

On October 2, 2007, a 26 year old woman – a Polish care worker, Magda Pniewska, returning home from the care home where she worked – walked through a car park in New Cross, South London. She was on the telephone to her sister. She was shot in the head and killed.

The shot was fired in an exchange of fire in the car park between two gunmen, Gnango (17 years old) and another youth known only as "Bandana Man" ("B"). Neither shooter had been aiming at the victim: they had been shooting at each other. Upon arriving at the car park, Gnango had spoken to four people in a car, two of whom said he told them that "he had come to meet someone to handle some business. Shortly thereafter, B arrived on the scene and began to shoot at Gnango, who returned fire.

Scientific evidence showed that the single bullet to the victim's head had come from B's gun, not Gnango's. Although B was clearly guilty of murder under the doctrine of "transferred malice'," he was never caught. Gnango was charged with and convicted of murder following trial. His conviction was overturned on appeal: the Court of Appeal held that "joint enterprise" liability for murder, the basis on which they considered his conviction to rest, could not arise on the facts. In considering the Crown's appeal, the Supreme Court was asked to address the following question of general public importance:

> "If D1 and D2 voluntarily engage in fighting each other, each intending to kill or cause grievous bodily harm to the other and each foreseeing that the other has the reciprocal intention, and if D1 mistakenly kills V in the course of the fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?"[1]

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[1] In this case note, the labels "D1" (primary defendant or offender) and "D2" (secondary, "indirect" offender), "V1" (intended victim) and "V2" (secondary, unintended victim) will be adopted, as appropriate.

The Supreme Court allowed the appeal by a majority of six to one,[2] and restored Gnango's conviction for murder.

B. The law

This case falls into what one might call "cross-fire" murders. It combined three areas of law in a way that had not arisen previously in this jurisdiction: (i) joint enterprise; (ii) transferred malice; and (iii) exemption from liability where a party to what would normally be a crime is a victim of it. In the judgment delivered by Lord Phillips and Lord Judge, these three were examined in detail. In addition, the judgment raises a question of consent to harm to oneself – although this was not examined by any of their Lordships.

1. Joint enterprise

Joint enterprise, stemming from section 8 of the *Accessories and Abettors Act* 1861, is the term used to describe one of two circumstances. In the first, D1 and D2 agree to the commission of an indictable offence – for example, burglary. Both are present at the scene of the offence, and D1 commits the offence. By virtue of joint enterprise liability, both are equally guilty of the offence: it is committed pursuant to their joint criminal purpose, and D2 is equally liable by virtue of having "aided, abetted, counselled, or procured" (as defined at common law) D1 to commit the offence.

The second form is more contentious, and has garnered some coverage in recent years in the context of gang-related affrays. Here, D1 and D2 again agree to commit an indictable offence (crime α – again, say, burglary). Upon entering the house they intend to burgle, they are met by the householder. D1 hits him over the head with a jemmy, and kills him (crime β). D2 had no intention or wish of such harm occurring, but he had foreseen the possibility that D1 might inflict serious injury on someone in the course of the burglary. D2's liablility stems from his having continued in the commission of crime α, when he realised (but probably did not wish) that crime β might be committed in the course of it: in our example, then, D2 has "associated himself with a foreseen murder".[3]

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[2] As to the reasoning adopted by each judge, see C., *post*. The leading judgment was given by Lord Phillips and Lord Judge, with whom Lord Wilson agreed; Lord Dyson, Lord Brown and Lord Clarke each gave a concurring judgment; and Lord Kerr gave the sole dissent.

[3] *R. v. A.* [2010] EWCA Crim 1622, [2011] Q.B. 841, [27] (Hughes L.J.).

2. Transferred malice

Transferred malice – perhaps better described as "transferred *mens rea*" – occurs where a defendant, D, intends to kill or cause serious injury to a victim, V1, but accidentally kills another, V2. So, in this case, where B shot at Gnango, intending to kill him or cause him serious bodily harm, but instead killed Pniewska. The doctrine applies also to accessories: thus, where D2 has aided, abetted, counselled or procured D1 to murder V1, but D1, intending to kill V1, accidentally kills V2, D2 will be guilty of the murder of V2.

3. The "victim rule": exemption from liability of the intended victim of a crime

This has often been called the "victim rule:"[4] where legislation is designed to protect a specific class of people, they will not be convicted as accessories to that offence, where they co-operate in its commission. This common law principle stems from the decision in *R. v. Tyrrell*.[5] There, a girl aged between 13 and 16 was convicted of aiding, abetting, counselling or procuring, and inciting, a man to have carnal knowledge of her, an offence under section 5 of the *Criminal Law Amendment Act* 1885. On appeal, her conviction was roundly quashed: it was "impossible to say that the Act … [could] have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves".[6] It was applied, if reluctantly, by the Court of Appeal in *R. v. Whitehouse*,[7] to preclude conviction of a father for inciting his under-age daughter to aid and abet him to commit incest with her. In relation to conspiracy to commit a crime, section 2(1) of the *Criminal Law Act* 1977 codified the "victim rule." Section 51 of the *Serious Crime Act* 2007 did the same for offences under Part 2 of that Act ("encouraging or assisting crime"), albeit more restrictively.

4. Consent to harm

Although their Lordships did not raise this fourth matter, the various approaches taken by the majority beg the question. It is most relevant, in this context, in its interplay with the "victim rule," and because of the approach taken to this case by their Lordships (as will become apparent, *post*). The fundamental principle is that the victim, V's consent to serious harm of him- or herself, in the absence of good reason, is no defence for the perpetrator of that harm, D.

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4 See Glanville Williams, "Victims and other exempt parties in crime" (1990) 10 Legal Studies 245.

5 [1894] 1 Q.B. 710 (Crown Cases Reserved).

6 *ibid.*, 712 (Lord Coleridge C.J.)

7 [1977] Q.B. 868.

Thus, in a prize fight, the fact that V, one of the fighters, consented to the fight, and foreseeable harm being inflicted upon himself by D, the other, was no defence for D.[8] Likewise, in a case where sadomasochists inflicted pain on each other for sexual gratification, with clear consent, this consent was no defence to the perpetrators.[9] It has also been held that, in any case, consent will not save D where the harm caused consists of a more than transient or trivial injury.[10]

C. The judgments

The majority in the Supreme Court may have agreed in the outcome, but they disagreed on their reasoning. Four different "routes" to convicting Gnango were mooted, with varying levels of support.

The first, "parasitic accessory liability,"[11] was the basis on which the case was left by the judge to the jury and on which they convicted: that Gnango and B participated in the commission of an affray, in the course of which B committed an offence (murder) which Gnango had foreseen he might commit.

The second was that Gnango aided and abetted B to shoot at him by encouraging him to do so. This was the approach that commanded the greatest support: it was led by the judgment of Lord Phillips and Lord Judge,[12] with whom Lord Wilson agreed, and was supported, if a little uncomfortably, by Lord Dyson.[13] This approach had, however, been rejected by the trial judge, and was not left to the jury.

The third basis treated Gnango and B as joint principals in a joint enterprise to engage in unlawful violence designed to cause death or serious injury, where death resulted. This was the basis on which Lord Brown[14] and Lord Clarke[15] would have upheld the conviction.

The fourth approach was that Gnango caused B to shoot at him, and the victim's death was a foreseeable consequence of this reaction.

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8 *R. v. Coney* (1882) 8 Q.B.D. 534 (Divisional Court). See also *Att.-Gen.'s Reference (No. 6 of 1980)* [1981] Q.B. 715 (Court of Appeal).

9 *R. v. Brown (A.)* [1994] 1 A.C. 212 (House of Lords); but see Lord Mustill's powerful dissent. *Cf. R. v. Wilson (A.)* [1997] Q.B. 47 (Court of Appeal), where a wife's consent to her husband branding her buttocks with a butter knife was held to be valid.

10 *R. v Emmett*, *The Times*, October 15, 1999 (Court of Appeal); the harm was an unintended consequence of consensual sadomasochistic sexual acts.

11 This term was coined by Professor Sir John Smith Q.C.: *R. v. Gnango* [2011] UKSC 59, *The Times*, December 15, 2011, [15].

12 *ibid.*, [64].

13 *ibid.*, [103]-[104].

14 *ibid.*, [71].

15 *ibid.*, [81].

This "route" was mooted by Lord Clarke,[16] and considered by Lord Dyson.[17]

Lord Kerr gave the only dissent, challenging each approach above, in turn. In discussing each approach, it is therefore helpful to contrast the majority judgments with that of Lord Kerr.

1. Joint enterprise: "parasitic accessory liability"

Their Lordships considered this approach, and variously rejected it, as had the Court of Appeal.[18] The argument ran that Gnango and B had a joint intention to have an affray (*Public Order Act* 1986, s.3(1) and (2),[19] crime α), in the performance of which B committed murder (crime β), which was foreseeable, and that Gnango should therefore be held liable for the murder.

Lord Phillips and Lord Judge examined in detail the offence of affray, on which the Crown had tried to base such liability. They dismissed this approach as follows:

> "if there was a joint intention to have an affray, that intention was to have an affray by shooting at each other with homicidal intent. It is artificial to treat the intention to have an affray as a separate intention from the intention to have a potentially homicidal shooting match."[20]

Lord Dyson agreed.[21]

In addition, their Lordships held that "[b]ecause affray does not necessarily involve any common purpose it cannot automatically constitute a foundation for parasitic accessory liability."[22] Lord Kerr agreed;[23] however, on a close analysis of section 3 of the *Public Order Act* 1986, his Lordship held that the words "towards another", in

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16 *ibid.*, [83]-[91].

17 *ibid.*, [106].

18 *R. v. Gnango* [2010] EWCA Crim 1691, [2011] 1 W.L.R. 1414 ("*Gnango* (C.A.)").

19 The section reads:

> "(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.
>
> (2) Where 2 or more persons use or threaten *the unlawful violence*, it is the conduct of them taken together that must be considered for the purposes of subsection (1)." [Emphasis added.]

Lord Phillips and Lord Judge considered whether the italicised words in s.3(2), *ante*, would imply that D1 and D2 would have to have engaged in violence towards another (*Gnango* (n.11), [36]), but dismissed this as "nonsensical" (*ibid.*, [37]). *Cf.* Lord Kerr's dissent, *post*.

20 *ibid.*, [43].

21 *ibid.*, [96].

22 *ibid.*, [38].

23 *ibid.*, [114].

subsection (1), meant that each of D1 and D2 only had the *mens rea* for an individual offence of affray, and that a joint affray was therefore unavailable as a basis for liability for Gnango.[24] In this, he disagreed with Lord Phillips and Lord Judge.[25]

On this point, therefore, in outcome, their Lordships were unanimous: because of the way the case was run by the Crown – that Gnango and B had participated in an affray by shooting at each other with homicidal intent – this route to liability was not open to them.

2. Aiding and abetting: secondary liability

This was the approach taken by the majority of four. Lord Phillips and Lord Judge, calling this the "direct route" that the Crown had believed was unavailable due to the "victim rule," laid it out as follows:

(iv) B attempted to kill Gnango;
(v) by agreeing to the shootout, Gnango aided and abetted B in this attempted murder;
(vi) B accidentally killed Pniewska instead of Gnango; under the doctrine of transferred malice he was guilty of her murder; and
(vii) the doctrine of transferred malice applied equally to Gnango as aider and abetter of B's attempted murder of him; therefore, he also was guilty of Pniewska's murder.[26]

By this logic, Gnango and B formed a mutual plan or agreement – either beforehand, or on the spur of the moment when they saw each other and fired at each other – to shoot at each other and be shot at, and in which each would attempt to kill or seriously injury the other.[27] Each was party to the other's attempt to kill or seriously injure him: Gnango aided, abetted, counselled and procured B to shoot at him with murderous intent, making him guilty of aiding and abetting the attempted murder of himself.

It is submitted that Lord Kerr's reasoning on this point was particularly clear. Gnango must have foreseen that, in engaging in a gunfight with B, he might be shot. However, "[b]eing shot at was hardly likely to have been a desired outcome on the part of Gnango. Intending to encourage B to fire at him was even less likely."[28] Gnango's intent, it is submitted, was to kill the killer and to avoid

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[24] *ibid.*, [112]-[113].
[25] See n.19, *ante*.
[26] *Gnango* (n.11), [44].
[27] Lord Dyson, especially, drew out the necessity that the shootout take place "pursuant to a plan" or agreement: *ibid.*, [101].
[28] *ibid.*, [125]. His Lordship draws support from Graham Virgo, "The Doctrine of Joint Enterprise Liability" [2010] 10 Archbold Review 6.

being killed himself. It is artificial to treat their intent as joint:[29] it is identical, but opposite.

Lord Kerr's primary objection, however, was that the jury were "never asked to confront the question whether the shared common purpose was not only to shoot, but to be shot at".[30] This finding was therefore not open as a "route" to upholding the conviction on appeal.[31] Indeed, apart from a finding that there was an "agreement to shoot and be shot at," there is an alternative, obvious basis on which the jury's verdict may have been founded. The judge had put to them the "parasitic accessory liability" approach, which all seven of their Lordships rejected. It being extremely likely that this was in fact the basis on which they convicted Gnango, "there was there was no occasion for them to consider whether the requisite intention on the part of Gnango to found a verdict of guilty on the basis of aiding and abetting was present."[32]

In coming to their conclusion, Lord Phillips and Lord Judge examined the question of whether the "victim rule" precluded their "accessory liability" approach. They established that the statutory rules contained in the 1977 and 2007 Acts (see B.3., *ante*) were not applicable in this case.[33] They held that their enactment indicated that there was no common law rule that precluded conviction of a defendant of being party to a crime of which he was the actual or intended victim[34] – which seems surprising, given what is said of *Tyrrell*. They also pray in aid the (now-repealed) common law offence of attempted suicide. With respect, this last point seems rather to beg the question: surely, its repeal by Parliament, by the *Suicide Act* 1961, indicated a shift in social norms; the common law does not continue to exist in some form of suspended animation independent of its current application; if the 1961 Act were repealed, this should not lead to the reinstatement of the common law offence of attempted suicide.

Their Lordships further referred with approval to *Brown*,[35] and quoted from *Att.-Gen.'s Reference (No. 6 of 1980)*, as follows: "… it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason".[36] They

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29 *Cf.* the quote at n.20, *ante*.
30 *Gnango* (C.A.) (n.18), [59]; see *Gnango* (n.11), [115].
31 *Gnango* (n.11), [122].
32 *ibid.*, [126].
33 *ibid.*, [49]-[51].
34 *ibid.*, [52].
35 (n.9.)
36 (n.8), 719 (Lord Lane C.J.).

saw no reason why they should extend the "victim rule" to apply in cases such as this.[37]

The consequence of the majority's judgment, on this reasoning, is that, had B's fatal shot missed Pniewska and hit Gnango, wounding him, but not fatally, Gnango should, on his recovery, have been tried for the attempted murder of himself. Although Lord Phillips and Lord Judge clearly state that there is no bar to such liability,[38] surely this would be a farcical spectacle?

It further opens up again the question of sadomasochistic sex act cases such as *Brown*. With respect, it is submitted that the fundamental principle at stake in such cases is that of consent to harm (see B.4., *ante*), and preventing giving the person inflicting the injury a defence. The "victims" in *Brown* clearly encouraged their assailants to harm them with the intent that they should do so; they too could now be charged (as aiders and abettors) with the intentional infliction of serious harm on themselves.

3. Joint participants in unlawful violence: liability as a principal

This approach, taken by Lord Brown and Lord Clarke, holds that Gnango was liable as a principal to a joint enterprise (an agreement between himself and B) to engage in unlawful violence specifically designed to cause death or serious injury, where death occurred as a result. Lord Phillips and Lord Judge held that, ultimately, whether Gnango was correctly described as a principal or an accessory was irrelevant to his guilt.[39]

However, here again, it is submitted that Lord Kerr's dissent is to be preferred. Joint enterprise liability is a form of secondary liability. D2 is implicated not only in the offence he and D1 agreed to undertake, but also in the foreseeable, further offence that D1 perpetrated. On the other hand:

> "The essential ingredient for joint principal offending is a contribution to the cause of the *actus reus*. If this is absent, the fact that there is a common purpose or a joint enterprise cannot transform the offending into joint principal liability.
>
> "The *actus reus* in this case was the killing of Ms Pniewska. To be guilty of that offence as a joint principal, it would have to be shown that Gnango caused or contributed to a cause of her death. … [I]t is not sufficient that he be shown to be engaged by agreement in violence designed to cause death or serious injury. The crucial question is whether he caused or contributed to the death of the victim. This is not an issue

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37 *Gnango* (n.11), [53].
38 *ibid.*, referring, in particular, to *Brown* (n.9).
39 *ibid.*, [62].

> which was put to the jury and a conclusion as to whether Gnango's actions caused or contributed to Ms Pniewska's death cannot be inferred from their verdict."[40]

4. Causation

This approach was mooted by Lord Clarke. In essence, it holds that, where D2 (Gnango) causes D1 (B) to shoot at him, and D1 hits V (Pniewska), a third party:

(i) D1's actions (shooting at D2) were a foreseeable consequence of D2's actions – be they telling D1 to come to the shoot-out or shooting at D1;
(ii) D2's actions were therefore *an* operative cause of V's harm;
(iii) D1's response, being caused by D2, was not therefore a *novus actus interveniens*.

Lord Clarke referred to *R. v. Pagett*.[41] There, Pagett shot at a policeman and held his pregnant girlfriend in front of him as a shield against any retaliation. The policeman returned fire, shooting and killing the girlfriend. At trial, Pagett was acquitted of murder, but convicted of manslaughter. The Court of Appeal, however, held that, if the jury was sure that the policeman had acted in reasonable self-defence, it was open to them to convict Pagett of murder.[42]

Lord Clarke proposed that it would have been open to the jury to convict Gnango if they were sure that his act in shooting at B was a cause of B shooting at him with intent to kill him or cause him serious harm, and Pniewska was killed as a result.[43] However, as the case was not put to the jury on this basis, his Lordship concluded that it was not open to the Supreme Court to adopt this approach.[44]

Lord Dyson also accepted that such an approach was viable, in such cases.[45] However, he correctly identifies that this would be difficult to prove, on the facts of *Gnango*. Lord Kerr makes this same point particularly clearly:

> "[This] thesis … depends on the proposition that B fired the fatal shot because he was caused to do so by Gnango firing on him. That proposition faces the immediate problem that B fired on Gnango first. …

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40 *ibid.*, [129]-[130].
41 (1983) 76 Cr.App.R. 279 (Court of Appeal).
42 *ibid.*, 291 (Goff L.J.). See *Gnango* (n.11), [85]-[88].
43 *Gnango* (n.11), [91].
44 *ibid.*, [92].
45 *ibid.*, [106]. His Lordship prays in aid the analysis of David Ormerod, "*R. v. Gnango*: Comment" [2011] Criminal Law Review 151. His Lordship also suggests that, following *R. v. Latif*, [1996] 1 W.L.R. 104 (House of Lords), it might be argued that, even if B was acting in a free, deliberate and informed manner, both might be liable (albeit perhaps to different extents) for Pniewska's murder.

> "If B fired at Gnango first, it seems to me highly questionable (at least) that Gnango's returning fire caused B to fire again. The first shot surely betokened an intention on the part of B to fire at and to hit Gnango, irrespective of whether Gnango fired back."[46]

It is submitted that this causation-based approach is to be preferred in cases such as this: it has the advantage of being clear, and of accurately reflecting the culpability of both D1 and D2. Where D2 shoots first, and D1 shoots back in reasonable self-defence, hitting V, D1 is not liable for murder. Where D1 shoots first, and D2 acts in reasonable self-defence, he is not automatically liable for D1's shooting of V.

D. Conclusion

1. Lord Kerr's dissent: legal clarity, not policy

As will be evident from the above, it is submitted that Lord Kerr's dissent is the clearest and most persuasive judgment. It correctly identifies the legal principles at stake in each approach mooted, and why they cannot in this case support a conviction for murder.

As to the reasons behind the majority's judgment, it is submitted that these can be seen most clearly in Lord Brown's judgment. He states: "The general public would in my opinion be astonished and appalled if in those circumstances the law attached liability for the death only to the gunman who actually fired the fatal shot". One might see Gnango's conviction as an attempt adequately to reflect the harm caused.

The death of Magda Pniewska was tragic. In the circumstances, the courts found themselves under considerable public pressure to deliver a conviction for her murder. On the facts, however, convicting Gnango of her murder seemed to require a considerable stretch of legal logic – especially as it was put to the jury. It is submitted that their Lordships should rather have sent the case back for a retrial, on the basis of the "causation" approach.

2. Armel Gnango's culpability

Gnango was clearly not a pleasant individual. He armed himself with a handgun, before going to meet someone he had a quarrel with. He shot at that person, with the intention to kill or at least to inflict grievous bodily harm. On the basis of these facts he was in fact convicted of attempted murder and of possession of a firearm with intent to endanger life (*Firearms Act* 1968, s.16), both of which carry a

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46 *Gnango* (n.11), [131]-[132].

maximum sentence of life imprisonment. Upon the quashing of his conviction of murder by the Court of Appeal, that court had sentenced him – as a 17-year-old – to detention for public protection with a minimum term of 15 years (equivalent to a determinate sentence of 30 years). In passing this sentence, the court said that his culpability was the same as if he had committed the full offence, and – somewhat remarkably – "[l]ikewise the harm which was the actual, and foreseen, consequence of his crime was the same, whichever his offence."[47] Whilst this looks suspiciously as if Pniewska's death was being reflected in his sentence, notwithstanding the court had just quashed his conviction for her murder, there is no escaping that he was due substantial custodial sentences for the offences of which he was undoubtedly guilty.

ATLI STANNARD.*

CANADA SAYS "NO" TO SAYING "YES" IN ADVANCE: THE UNCONSCIOUS SEXUAL COMPLAINANT

R. v. J.A., 2011 SCC 28, [2011] 2 S.C.R. 440
(May 27, 2011)
Supreme Court of Canada

Consent – Sexual assault – Unconsciousness

The issue

Can an accused perform sexual acts on an unconscious complainant without attracting criminal liability if the complainant has consented to these acts in advance of being (again, with consent) rendered unconscious? This was the question the Supreme Court of Canada had to grapple with in *R. v. J.A.* By a majority (6 : 3), the court said "no", holding that the *Canadian Criminal Code* defined consent in a way that required the complainant to be conscious throughout the sexual activity in question, so as to be able to evaluate each and every sexual act committed.

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47 *Gnango* (C.A.) (n.18), [84].

* M.A. (Oxon.), B.A. Hons (Cantab.), Barrister (Middle Temple).

The background

The complainant and the accused were long-time partners. One evening, while lying in bed, after the parties had kissed and undressed, the accused placed his hands around the complainant's throat and choked her until she was unconscious. She had consented to the accused choking her, and understood that she might lose consciousness; the two had previously experimented with erotic asphyxiation, and she had lost consciousness before. When she regained consciousness about three minutes later, she was on her knees at the edge of the bed with her hands tied behind her back, and the accused was inserting a dildo into her anus. In her evidence-in-chief, the complainant said that this was the first time the accused had inserted a dildo into her anus, but during cross-examination she said that they had tried it once previously. The accused removed the dildo ten seconds after the complainant regained consciousness, and, after vaginal intercourse, he cut her hands loose. The complainant made a complaint to the police, saying she had not consented to the sexual activity that had occurred; she later recanted this allegation, claiming she had made a false complaint to the police because the accused had threatened to seek sole custody of their son.

The trial judge found that, although the complainant had consented to being choked, she had not consented to the insertion of the dildo, and that the accused was guilty of sexual assault. The trial judge also held that, in the alternative, the complainant could not legally consent to sexual activity that took place while unconscious. On appeal, the Ontario Court of Appeal unanimously held that there was insufficient evidence at trial to conclude beyond reasonable doubt that the complainant did not consent to the insertion of the dildo in advance of unconsciousness. The majority also held that individuals could consent in advance to sexual activity that occurs while they are unconscious. The Crown appealed to the Supreme Court of Canada under section 693(1)(a) of the *Canadian Criminal Code*, namely, on a question of law on which a judge of the court of appeal dissents. Whether the complainant had actually consented was, therefore, not at issue: the only question was whether consent, for the purposes of sexual assault, required the complainant to be conscious throughout the sexual activity.

The Supreme Court's judgment

Delivering the majority judgment, McLachlin C.J. started by setting out the law of sexual assault ([23]-[25]). The *actus reus* of sexual assault is established if the Crown prove that the accused touched another person in a sexual way without that person's consent. The absence of consent is determined by the complainant's subjective

internal state of mind towards the touching (see *R. v. Ewanchuck* [1999] 1 S.C.R. 330, [26], Supreme Court of Canada). As to *mens rea*, the Crown must prove that the accused knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant consented to engage in the sexual activity.[1] At issue in this case was consent for the purposes of the *actus reus*.

McLachlin C.J., for the majority, then moved on to consider the provisions of the *Code* that dealt with consent, seeking to interpret them in a harmonious way ([33]). Section 273.1(1) of the *Code* provides that "consent", for the purposes of sexual assault, means "the voluntary agreement of the complainant to engage in the sexual activity in question". She found that this provision, by its reference to "engage in the sexual activity in question", suggested that the consent of the complainant must be specifically directed to each and every sexual act, rather than broad advance consent ([36]). She also noted that in *Ewanchuk* the Supreme Court had interpreted this provision as requiring the complainant to consent to the activity at the time it occurs. Fish J., however, delivering the minority judgment, argued that nothing in section 273.1(1) referred to the timing of consent, or otherwise excluded advance consent to unconscious sexual contact ([96]), and pointed out that in *Ewanchuk* neither capacity to consent, nor timing of consent, were at issue ([126]). It is respectfully submitted that the minority's interpretation is to be preferred. While the words "engage in the sexual activity in question" may preclude *broad* advance consent, they do not preclude a person giving voluntary agreement to *specific* sexual activities that will occur while the person is unconscious.

Section 273.1(2) qualifies section 273.1(1) by setting out a non-exhaustive list of circumstances in which "no consent is obtained". One of these is where "(b) the complainant is incapable of consenting to the activity". The majority said that this reflected Parliament's concern that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent, and that this lack of mental capacity might arise from unconsciousness. It followed that Parliament intended consent to mean the conscious consent of an operating mind ([36]). On the other hand, the minority thought that paragraph (b) had no application to the issue in the case before them – while consent could not be obtained from a person who is, at the time, incapable of consenting, paragraph (b) did not contemplate advance consent being obtained at a time when the

[1] For the sake of readability, it is assumed that the accused is male and the complainant female. However, this might not be the case.

complainant was capable of doing so ([101]). It is submitted that, again, the minority's approach is to be preferred. Section 273.1(2) certainly precludes an accused obtaining consent from an unconscious person to a specific sexual activity, but says nothing about an accused obtaining consent, from a person who is conscious and capable of consent, to a specific sexual activity that will occur while the person is unconscious. It is the author's view, however, that, if the prosecution prove that the sexual activity occurred while a person was incapable of consenting (*e.g.* unconscious), then this will be sufficient to prove lack of consent unless there is sufficient evidence to raise advance consent as an issue. If there is, then the prosecution will have to prove beyond reasonable doubt that the complainant did not give advance consent to the specific sexual activity occurring while she was unconscious. It is interesting to note that, on the facts of *R. v. J.A.*, as set out by the Supreme Court, it does not appear that there was any evidence that the complainant gave specific, advance consent to the insertion of a dildo into her anus while unconscious.

The court then went on to consider section 273.1(2)(d) and (e). These provide that consent is not obtained where "(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity", or where "(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity". As both of these paragraphs referred to the expression of lack of consent, the majority found that it was clear that they only went to the accused's *mens rea* ([39] and [40]). The complainant is not required to express lack of consent or revocation of consent in order for the requirements of the *actus reus* to be fulfilled, as the *actus reus* only requires a complainant's subjective non-consent. In relation to paragraph (d), the majority found that the linking of lack of consent to "the activity" suggested "a present, on-going conception of consent, rather than advance consent to a suite of activities". In relation to paragraph (e), this indicated that Parliament wanted people to be capable of revoking their consent at any time during the sexual activity, something that could not be done if the complainant has been rendered unconscious. The minority agreed both that prior consent to sexual activity could later be revoked, and that an unconscious person could not consent or revoke consent, but: "It hardly follows ... that consenting adults cannot, as a matter of law, willingly and consciously agree to engage in a sexual practice involving transitory unconsciousness – on the ground that, during the brief period of that consensually induced mental state, they will be unable to consent to doing what they have already consented to do" ([103]). Contrary to the majority's interpretation, the minority thought that

paragraph (e) suggested that the complainant's consent can be given in advance, and remained operative unless and until it was subsequently revoked ([104]). It is submitted, however, that paragraph (e) provides the strongest support for the majority's view. An unconscious complainant cannot revoke consent, and it is no answer to say that she can revoke consent on regaining consciousness – the particular sexual activity may already have ended, and a complainant's post-act sentiments are irrelevant. On the other hand, (i) paragraph (e) goes to the accused's *mens rea*, not the *actus reus*, which was at issue in this case, and (ii) the complainant has agreed to put herself in a position where she is unable to express revocation of previously expressed consent. It must be borne in mind that the court was not considering a complainant who agrees to a particular sexual activity, and then falls unconscious (as might happen to an intoxicated complainant); the court was concerned with a complainant who consents to the particular activity and to it occurring while she is (consensually) unconscious.

Finally, section 273.2(b) provides that "it is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject matter of the charge where ... (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". The majority asked: "How can one take reasonable steps to ascertain whether a person is consenting to sexual activity while it is occurring if that person is unconscious?" ([42]). Further, the construction "was consenting" indicated that the complainant's consent must be a continuing state of mind. The minority, however, read the provision differently – that "consented" and "was consenting" referred to prior consent ([107]). This was supported by the French text of the provision (where "consented" was expressed as "*avait consenti*"). In answer to the majority's question, it is the author's view that if the circumstances known to the accused at the time are that the sexual acts are to occur while the complainant is unconscious, then the taking of reasonable steps requires him to ascertain the scope of the complainant's consent – *i.e.* what specific activities is she consenting to? If he does not, then his belief that the complainant consented is no defence.

The majority concluded (at [66]) that:

> "The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether

> she is consenting is therefore not consensual within the meaning of the *Criminal Code*."[2]

As for the minority, applying the principles that (i) consent will be vitiated where the contemplated sexual activity involves a degree of bodily harm or risk of fatal injury that cannot be condoned under the common law, or on grounds of public policy, (ii) prior consent affords no defence where it is later revoked, and (iii) prior consent affords no defence where the ensuing conduct does not comply with the consent given, Fish J. concluded that a conscious person can freely and voluntarily consent in advance to agreed sexual activity that will occur while she is briefly and consensually rendered unconscious ([75]-[80]). As to (i), the issue whether the complainant suffered bodily harm was not before the Supreme Court. As to (ii), it is submitted that this principle is of questionable application, as a person cannot revoke consent while unconscious, and revocation on regaining consciousness could only relate to activities that were continuing, not to activities that had already occurred. As to (iii), this is a sound principle that would, rightly, require the court to inquire into the scope of the complainant's consent.

The minority were concerned that the Crown's position would achieve the exact opposite result from that intended by the relevant provisions of the *Code*: rather than safeguarding and enhancing the sexual autonomy of women, the majority's interpretation would "deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others" ([72]-[73]). It is submitted that this is correct. The majority's judgment has made it impossible, under Canadian law, for a woman to consent to a particular sexual activity that will occur while she is unconscious, and criminalises her partner for acting as she agreed he would act.

The minority also pointed out that the majority's interpretation would lead to absurd consequences – for example, that "cohabiting partners across Canada, including spouses, commit a sexual assault when either one of them, *even with express prior consent*, kisses or caresses the other while the latter is asleep" ([74], emphasis in the original). The majority's response was to point out that the suggested defence would only operate where the complainant, before going to sleep, specifically turned her mind to consenting to the particular sexual acts that occurred later ([59]). It is submitted that,

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[2] This conclusion is consistent with the earlier decision of the Court of Appeal of Alberta, *R. v. Ashlee*, 2006 ABCA 244, 222 C.C.C. (3d) 477, in which the majority said (at [42]): "Consent to sexual activity, if it existed, does not remain operative after the consenting party lapses into unconsciousness. Parliament's words and intention are clear: no still means no, whether expressed by the complainant or by Parliament."

on this point, the majority is correct. Specific, advance consent will not usually be present in the situation set out by the minority, and so the absurd consequences identified will occur even if the statutory provisions are interpreted to allow for such consent. The answer to this, though somewhat unsatisfactory from a jurisprudential viewpoint, is that, in the context of a loving and happy relationship, there is never going to be a complaint, let alone a prosecution, even if there has been no specific, advanced consent.

In response to the minority's interpretation, the majority also highlighted the risk that the unconscious person's wishes would be innocently misinterpreted by her partner, and the evidentiary difficulties created by the fact that the unconscious person has no real way of knowing what happened during the period of unconsciousness ([60] and [61]). As to the former, it is submitted that this highlights the importance of taking reasonable steps to ascertain the scope of the other person's consent. As to the latter, this is, to some extent, the risk taken by a person who voluntarily agrees to being made unconscious and to sexual activities occurring while she is unconscious (though this should be not be read as suggesting that the partner of such a person has *carte blanche* just because she will not know what he is doing to her).

Perspectives from other Commonwealth jurisdictions

The minority judgment referred to the *Sexual Offences Act* 2003 in England and Wales. Under section 74 of that Act, "a person consents if he agrees by choice, and has the freedom and capacity to make that choice", and section 75(1) and (2)(e) provide rebuttable presumptions that the complainant did not consent, and that the accused did not reasonably believe that the complainant consented, if the complainant "was asleep or otherwise unconscious at the time of the relevant act". These presumptions are rebutted if "sufficient evidence is adduced to raise an issue as to whether" the complainant consented, or the accused reasonably believed that the complainant consented. To date there has been no reported case law on this provision[3]. When the time comes for the courts to consider it, it is submitted that careful consideration will need to be given to the evidence of the complainant's prior consent – how was this consent expressed? What activities did it

[3] Since this casenote was composed, there has been one decision of the Court of Appeal on s.75 (*R. v. Ciccarelli* [2011] EWCA Crim. 2665), *The Times*, December 13, 2011, C.A.), in which the court upheld a trial judge's decision to refuse to leave the issue of reasonable belief in consent to the jury, ruling that before the question of a defendant's reasonable belief in the complainant's consent could be left to the jury, some evidence beyond the fanciful or speculative must be adduced to support the reasonableness of his belief in her consent to him touching her sexually when she was fast asleep; a mere assertion by the defendant of his belief in consent was not sufficient.

cover? Did the accused confine himself or herself to those activities? In the light of *R. v. J.A.*, it may prove difficult for the accused to point to sufficient evidence to satisfy the judge that there is a real issue about consent that is worth putting to the jury[4].

Other Commonwealth jurisdictions also make specific provision for the unconscious complainant. In New Zealand, "[a] person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious" (*Crimes Act* 1961, s.128A(3)). In South Australia, a person consents to sexual activity if the person "freely and voluntarily agrees to it" (*Criminal Law Consolidation Act* 1935, s.46(2)), but "a person is taken not to freely and voluntarily agree to sexual activity if … the activity occurs while the person is asleep or unconscious" (s.46(3)(c)). The wording of both these provisions means that prior consent will not save an accused from criminal liability if the sexual activity occurs while the complainant is unconscious: the focus in each is on the complainant's state of consciousness at the time of the sexual activity, not at the time of any consent.

The provisions in force in the Australian states of Victoria and New South Wales, on the other hand, are not so focused. In Victoria, consent means "free agreement", and "[c]ircumstances in which a person does not freely agree to an act include ... (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing" (*Crimes Act* 1958, s.36(d)). It is submitted that this provision could be interpreted as not applying where there is free agreement prior to the person becoming unconscious. However, the Victorian courts may be influenced by the Canadian Supreme Court's interpretation of section 273.1(2)(b) of the *Canadian Criminal Code* (no consent is obtained where the complainant is incapable of consenting to the activity) in *R. v. J.A.*, and find otherwise.

In New South Wales, "a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse" (*Crimes Act* 1900, s.61HA(2)), and "a person does not consent to sexual intercourse ... (d) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep" (*Crimes Act* 1900, s.61HA(4)(b)). It is submitted that a person who consents in advance to sexual intercourse that will occur while that person is unconscious does have the opportunity to consent to the sexual intercourse; but again, *R. v. J.A.* may influence the interpretation of this provision.

LINDA RICHARDSON.*

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4 This seems to be borne out by *R. v. Ciccarelli*, *ante*.

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EVIDENCE OF PROPENSITY AND IDENTIFYING THE ISSUES

Stubley v. Western Australia, [2011] HCA 7, (2011) 275 A.L.R. 451
(March 30, 2011)
High Court of Australia

Evidence – Bad character – Propensity

A. Background

The appellant, Dr Alan Stubley, was a psychiatrist who had engaged in private practice between 1965 and 2000, and who had also consulted as a psychiatrist at the Royal Perth Hospital from about 1966 to 1976. He was charged with seven counts of rape, one count of attempted rape and six counts of unlawful and indecent assault, in respect of two women, J.G. and C.L., the prosecution alleging that he had engaged in sexual activity with them without their consent whilst they were his patients, in J.G.'s case between 1975 and 1978 and in C.L.'s case between 1977 and 1978. The offences were said to have occurred in his consulting rooms during appointments scheduled for psychotherapy.

The appellant was also alleged to have engaged in sexual activity – both indecent touching and sexual intercourse – with three further women, L.B., M.M. and A.W. This was also alleged to have occurred without their consent whilst they were his patients, and was also said to have taken place in his consulting rooms. He was not charged with any offences relating to this alleged conduct, but the prosecution applied to adduce evidence of these allegations as propensity evidence. His counsel informed the trial judge that he accepted that some or all of the sexual activity with J.G. and C.L. had occurred, but that he maintained that it had all been consensual. The prosecution's application was granted, and at the appellant's trial L.B., M.M. and A.W. were duly called to give live evidence of the appellant's conduct.

At the conclusion of this trial, the appellant was convicted of 10 of the 14 counts, and sentenced to 10 years' imprisonment. He appealed against both conviction and sentence to the Court of Appeal of Western Australia, challenging the admissibility of the evidence of L.B., M.M. and A.W. That court, by a majority of two to one (Owen and Buss JJ.A., Pullin J.A. dissenting), dismissed his appeal against conviction, but reduced his sentence to six years' imprisonment. He was subsequently granted special leave to appeal against that dismissal to the High Court of Australia (Gummow, Heydon, Crennan, Kiefel and Bell JJ.).

B. Legislation

The disputed evidence from L.B., M.M. and A.W. was admitted under section 31A of the *Evidence Act* 1906 (Western Australia), which provides:

> "31A. Propensity and relationship evidence
>
> (1) In this section —
>
> 'propensity evidence' means —
>
> (a) similar fact evidence or other evidence of the conduct of the accused person; or
>
> (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;
>
> 'relationship evidence' means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.
>
> (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
>
> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
>
> (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion."

This provision was inserted by section 13 of the *Criminal Law Amendment (Sexual Assault and Other Matters) Act* 2004 (Western Australia), and replaced the common law rule that similar fact evidence was inadmissible unless, when considered with the other evidence in the prosecution's case, there was no reasonable view of that evidence that was consistent with the innocence of the accused.

C. Discussion

The court noted that the explanation of "significant probative value" in section 31A(2)(a) of the 1906 Act put forward by Steytler P. in the Court of Appeal of Western Australia in *Dair v. Western Australia* (2008) W.A.R. 413 (*viz.* that the evidence would have to be such as could rationally affect the assessment of the probability of the

relevant fact in issue to a significant extent) was accepted, and accordingly considered the issue on that basis.

It said that it was relevant that the question of whether the appellant had engaged in the sexual activity alleged by J.G. and C.L. was not a live issue at trial and that the trial had been conducted from the outset on the basis that that activity was not disputed, as this was material to the consideration of the admissibility of the disputed propensity evidence or relationship evidence. Since it was accepted that the appellant had had sexual relationships with patients, the probative value of that evidence to demonstrate that he had done so was no longer significant. The court proceeded to consider other issues to which it had been suggested the evidence was relevant.

One suggestion was that the evidence demonstrated the appellant's capacity to exploit his power and ascendancy by manipulating women, without violence or express threats, to acquiesce in sexual activity with him without their consent. However, the court noted that the prosecution case was that J.G. and C.L. had not consented or their consent had been obtained by threats or intimidation. It held that, since L.B., M.M. and A.W. had given no evidence as to threatening or intimidating conduct, their evidence could not rationally affect the assessment of the likelihood that the consent of J.G. or C.L. had been obtained by such conduct, and that proof that the appellant had a tendency to engage in grave professional misconduct by manipulating his younger, vulnerable, female patients into having sexual contact with him could not rationally affect the assessment of the likelihood that J.G. or C.L. had not consented to such contact.

The court also considered the issue of why J.G. and C.L. had not made timely complaints and had continued to attend on the appellant for treatment, which was relevant to the credibility of their evidence that they had not consented to their sexual contact with the appellant. However, doubting in any event whether the evidence could be admissible in order to support acceptance of the plausibility of J.G. and C.L.'s accounts in this respect, it held that the differing accounts put forward by all five women were incapable of bearing rationally on the assessment of these accounts.

Finally, it considered the question of whether, if the jury were satisfied that J.G. or C.L. had not consented to any sexual contact, they could be satisfied that the appellant had not reasonably believed that they had consented. However, it concluded that, although the evidence was capable of proving a pattern of sexual misconduct between the appellant and younger, vulnerable, female patients, and the appellant's psychological ascendancy over those patients, these factors were not inconsistent with him holding an honest belief that the victims of his attention were consenting to the conduct, and that,

absent any feature of the evidence tending to demonstrate his awareness that his manipulation of his patients had not succeeded in procuring their consent, proof of an imbalance of power did not rationally bear on this issue.

D. Outcome

By a majority of four to one (Gummow, Crennan, Kiefel and Bell JJ., Heydon J. dissenting), the appellant's appeal against conviction was allowed. However, his counsel's submissions that his convictions should be set aside and verdicts of acquittal entered were not accepted, and the court directed a new trial.

E. Comment

In England and Wales, the admission of propensity evidence is governed by the bad character provisions in Chapter 1 of Part 11 of the *Criminal Justice Act* 2003. They provide, *inter alia*, that "evidence of the defendant's bad character is admissible if ... it is relevant to an important matter in issue between the defendant and the prosecution" (s.101(1)(d)) and that "the matters in issue between the defendant and the prosecution include — (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence; (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect" (s.103(1)). Such evidence, however, must be excluded if "it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it" (s.101(3)). In Northern Ireland, Part II of the *Criminal Justice (Evidence) (Northern Ireland) Order* 2004 (S.I. 2004 No. 1501 (N.I. 10)) makes identical provision.

However, although the English provisions are on the face of it quite straightforward, their application has proved somewhat problematic, and, in contrast to the logical and analytical approach demonstrated in *Stubley*, the English courts have on occasion taken a rather broader view as to the admissibility of evidence said to go to propensity. For example, in *R. v. Miller* [2011] Crim.L.R. 79 ([2010] EWCA Crim. 1578), the Court of Appeal of England and Wales (Leveson L.J., Tomlinson and Davis JJ.) held that a conviction for rape committed as part of a gang by the then-16-year-old appellant against a 15-year-old girl was admissible as evidence of propensity in the now-25-year-old appellant's trial for rape of his 11-year-old niece at his mother's house. Rather than give that conviction's relevance to the issues the detailed consideration shown in this case, the court

held that the mere fact that the allegations both involved an underlying abuse of power was sufficient to justify the conclusion that the previous conviction was admissible as evidence of propensity.

This broad approach has been compounded by a tendency on the part of the English courts to treat evidence as admissible to demonstrate propensity, when in reality it is both relevant and admissible as going to a far more important issue. For instance, in *R. v. Woodhouse*, 173 J.P. 337 ([2009] EWCA Crim. 498), the Court of Appeal of England and Wales (Rix L.J., Calvert-Smith J., Judge Paget Q.C.) held that a police caution administered after the appellant had touched the penis of a 13-year-old boy was admissible as propensity evidence at trial on an allegation that he had touched the penis of another 13-year-old boy; the evidence was in fact far more relevant simply to the issue of accident, the appellant's defence having been that the touching had not been intentional. Likewise, that court (Pitchford L.J., Owen J., Judge Beaumont Q.C.) in *R. v. Hamidi and Cherazi* [2010] Crim.L.R. 578 ([2010] EWCA Crim. 66) held that evidence that the appellant had been accused of involvement in a "missing trader" fraud (a species of fraud that has been rife in the United Kingdom and which has resulted in huge losses of value added tax) was admissible as propensity evidence at his trial on an allegation of involvement in a later of the same type; similarly, the evidence was instead relevant more to the issue of knowledge, his defence having been that he had been an innocent dupe for a second time.

However, there are signs of increasing clarity, and in *R. v. D.*; *R. v. P.*; *R. v. U.* [2011] 4 All E.R. 568 ([2011] EWCA Crim. 1474), the same court (Hughes L.J., Roderick Evans and Gloster JJ.) acknowledged that evidence that a defendant accused of sexual abuse of a child had been in possession of indecent images of children was relevant to the issue of whether he had a sexual interest in children. It correctly pointed out that, although such evidence was not evidence that he had demonstrated a practice of committing offences of sexual abuse or assault, such a sexual interest was a relatively unusual character trait and did make it more likely that the allegation of the child complainant was true, the force of the evidence deriving from the unlikelihood of coincidence. It is to be hoped that this is an indication that the more logical and considered approach exemplified by the High Court of Australia in *Stubley* is gradually gaining ground throughout Commonwealth jurisdictions.

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EXTRADITION ON LONG-DELAYED CHARGES

Fuller v. Att.-Gen. of Belize [2011] UKPC 23
(August 9, 2011)
Privy Council

The State v. Aneal Maharaj [2011] FJHC 573
(September 20, 2011)
High Court of Fiji

Extradition – Delay – Abuse of process

A. Introduction

This case note examines two recent decisions in which the applicants attempted to resist extradition on the grounds of "inordinate delay". It opens by giving an outline of the facts in each case. By way of comparison, it then sets out the approach adopted in extradition proceedings in England and Wales to delay. It then analyses the conclusion of each court.

Although other matters may make extradition unjust or oppressive – and were raised in both cases – this case note focuses solely on injustice or oppression arising from the passage of time.

B. The facts

1. Fuller v. Att.-Gen. of Belize

On March 22, 1990, Larry Miller was shot and killed in Miami, Florida. A warrant was issued the following day for the arrest of Rhett Allen Fuller, on charges including the first degree murder of Miller. This warrant was not then executed.[1] Fuller left the United States and went to Belize.

From 1990 to 1998, Fuller lived openly in Belize.[2] Throughout this period, he was contacted, from time to time, by United States law enforcement officers.[3] In particular, he was asked, at various junctures, to testify against another man accused of Miller's murder; to participate in a "sting" operation;[4] questioned, whilst not under caution, about witness statements in the Miller case, and about

1 *Fuller v. Att.-Gen. of Belize* [2011] UKPC 23 (August 9, 2011), [1], [61].
2 *ibid.*, [62].
3 *ibid.*, [63]-[68].
4 *ibid.*, [66].

another murder;[5] and variously offered a plea bargain,[6] or "given to understand" that he was not at risk of prosecution.[7]

In 1991 or 1992, Fuller was indicted in Belize for possession of an unlicensed firearm, and its importation in breach of Customs regulations; and United States officials in Belize were alerted to this prosecution.[8] At trial, Fuller alleged that the firearm had been planted on him by United States law enforcement agents, and was acquitted on both charges.[9]

In January 1998, a grand jury in Florida indicted Fuller for Miller's first degree murder.[10] In August 1998, the United States embassy in Belize made a formal request for Fuller's extradition for trial in that jurisdiction, supported by an affidavit that alleged that United States officials only became aware of Fuller's whereabouts in October 1997.[11] In October 1998, Fuller was arrested and remanded in custody.

In February 1999, after a hearing, the Chief Magistrate ordered his extradition, remanding him in custody in the interim. In May 1999, Fuller was granted leave to apply for a writ of *habeas corpus* and, in June, was granted bail, pending the hearing of his application. The application was refused by the Chief Justice, sitting in the Supreme Court, in April 2002. Leave to appeal to the Court of Appeal was granted on May 20, 2002, and bail was granted pending appeal. A notice of appeal was filed on the following day.

Nearly six years later, in March 2009, the Court of Appeal dismissed Fuller's appeal. A further year later, in March 2010, the Court of Appeal granted leave to appeal to the Judicial Committee of the Privy Council ("the Privy Council").

The Privy Council's judgment was therefore delivered twenty-one years, four months, and eighteen days after the murder of which Fuller stands accused.

This case note focuses on the matter of abuse of process due to the delay. The matters on which Fuller founded his substantive abuse of process application included:

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5 *ibid.*, [67], [68].

6 *ibid.*, [63], [66], [67].

7 *ibid.*, [67]. This founded a claim (outside the scope of this case note) that the extradition proceedings were unjust or oppressive because the U.S. officials had made assurances that Fuller would not be prosecuted (*ibid.*, [71]-[72]); the Board rejected this swiftly (*ibid.*, [73]).

8 *ibid.*, [65].

9 *ibid.*, [66].

10 *ibid.*, [1], [69].

11 *ibid.*, [69]. This founded a claim (again, outside the scope of this case note) that the extradition proceedings were unjust or oppressive because of a deliberate attempt by U.S. officials to deceive the court as to the reason for the delay in commencing proceedings (*ibid.*, [71]-[72]); the Board, however, put this down to "a breakdown in communications" (*ibid.*, [74]).

(i) the 13-year delay[12] between the alleged offence and the extradition request, notwithstanding the US authorities' knowledge that he was in Belize;
(ii) the 12-year delay in the extradition proceedings in the courts of Belize.[13]

2. State v. Maharaj

The facts given in this case are as alleged by the prosecution. In 1995, or thereabouts, Aneal Maharaj, a Fijian, began promoting a business in California which he represented as reducing the time it took for customers to pay off their home mortgages.[14] It was designed, in effect, as a Ponzi scheme, with elements of a pyramid scheme. Maharaj sold "regional centres" at a premium (typically U.S. $100,000 each[15]), which were said to give the owners income from other people who joined the scheme in their area.[16] He misrepresented the benefits on offer as being guaranteed by a federally insured independent financial institution; this was actually a shell company, controlled by Maharaj.[17]

In establishing his scheme, Maharaj is alleged to have perpetrated mail and wire fraud – *i.e.* using the mail services, or interstate wire communications, to carry out a scheme to obtain money or property by deception, knowingly, and with intent to defraud.

He concealed his income and personal use of his companies' money by using other individuals to prepare and negotiate cheques and as signatories on the business accounts he opened.[18] He was accordingly charged with the offence of structuring transactions to avoid reporting requirements.

In 2003, he failed to file a tax return, thereby evading income tax for that period,[19] and was charged accordingly with tax evasion.

With the money paid into this business, he bought himself two luxury cars and a boat,[20] and put down deposits on a number of properties, in his own name, and that of his girlfriend.[21] In respect of these purchases, he was charged with money laundering.

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12 This is the time given in the judgment; on the facts, it would appear that there was an eight-year delay between the murder (1990) and the extradition request (1998).
13 *ibid.*, [71].
14 *The State v. Aneal Maharaj* [2011] FJHC 573 (September 20, 2011), [22].
15 *ibid.*, [25]-[27].
16 *ibid.*, [23].
17 *ibid.*
18 *ibid.*, [30].
19 *ibid.*
20 *ibid.*, [26]-[27].
21 *ibid.*, [31].

When applying for mortgages to buy the various properties, in Maharaj's and his girlfriend's names, he misrepresented their incomes, and in one instance posed as the purchaser of property held in her name, but controlled by him.[22] He was accordingly charged with bank fraud.

Finally, in 2006, he was declared bankrupt. On 8 November, 2006, he failed to list the property held in his girlfriend's name in a schedule of his assets, as required by the Nevada bankruptcy court in his case.[23] He was therefore charged with making a false declaration in relation to a bankruptcy petition.

The above charges were contained in an indictment filed in October 2008, in Nevada, by which time Maharaj appears to have returned to Fiji. On April 5, 2010, a magistrates' court ordered that Maharaj be held in custody for surrender to the United States.[24] He failed in an appeal to the High Court of Fiji against the custody order,[25] and – at issue in the judgment examined – applied for a stay of the extradition proceedings on grounds including:

(i) the history of inordinate delay in the prosecution of the charges against him;
(ii) the "strong likelihood" (due also to the passage of time) that he would be unable to interview and make available to the court prospective witnesses that could vindicate him at trial; and
(iii) the real risk that the witnesses' memory of the events would have failed, given the passage of time and the inordinate delay in the proceedings.

The delay, in Maharaj's case, between the earliest fact at issue and the High Court judgment, was of sixteen years; and, by contrast with *Fuller*, the latest fact on which the indictment was founded took place on November 8, 2006 – a mere four years, ten months, and twelve days before the High Court judgment under consideration was delivered.

C. Delay as a bar to extradition in England and Wales

Both courts considered the current approach in England and Wales. It should, first of all, be noted that a stay on the grounds of delay is an extreme remedy, only granted in exceptional circumstances.[26]

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22 *ibid.*

23 *ibid.*, [32].

24 *D.P.P. v. Maharaj* [2010] FJMC 193 (April 5, 2010); see also *D.P.P. v. Maharaj* [2010] FJMC 27 (July 7, 2010)

25 *Maharaj v. State* [2011] FJHC 497 (September 5, 2011).

26 *Woodcock v. New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 W.L.R. 1979, [17] (Simon Brown L.J.); *Beresford v. Australia* [2005] EWHC 2175 (Admin), [2005] Extradition L.R. 113, [23].

Sections 14 and 84 of the *Extradition Act* 2003 contain the provisions on delay as a bar to extradition in Category 1 and 2 cases,[27] respectively, and are identical. They provide that:

> "A person's extradition … is barred by reason of the passage of time if (and only if) it appears that it would be *unjust* or *oppressive* to extradite him by reason of the passage of time since he is alleged to have … committed the extradition offence".[28]

This is similar (but not identical) to the earlier provision contained in section 11(3)(b) of the *Extradition Act* 1989, which was derived from the *Fugitive Offenders Act* 1967.

In *Kakis v. Cyprus*,[29] Lord Diplock considered what would make it "unjust or oppressive" to extradite:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."[30]

1. The key question

The key issue, under sections 14 and 84 of the *Extradition Act* 2003, is not whether it would be unjust for the defendant to be tried, but whether it would be unjust or oppressive to extradite him.[31] However, the courts invariably consider the effect of delay on the

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[27] The provisions and case law on delay do not distinguish between the categories; as such, the categories are peripheral to the issue at hand; however, for completeness, the essential distinction is that Category 1 are those that are party to the E.U. *Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, as amended. Under the 2003 Act, no territory may be designated to Category 1 if the accused may face the death penalty if extradited to that country (s.1(3) of the 2003 Act). Category 1 territories are currently Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden (*Extradition Act 2003 (Designation of Part 1 Territories) Order 2003* (S.I. 2003 No. 3333), as amended). All other territories fall under Category 2 (and are listed in the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003* (S.I. 2003 No. 3334), as amended). The requesting state, in both cases at issue, was the United States of America.

[28] Emphasis added.

[29] [1978] 1 W.L.R. 779 (U.K. House of Lords).

[30] *ibid.*, 782-3. Although his Lordship was naturally addressing himself the *Fugitive Offenders Act* 1967, his *dictum* remains relevant.

[31] *Woodcock* (n.26), [20]; *Beresford* (n.26), [22].

fairness of any trial in the requesting state, especially as regards the mechanisms in place in that jurisdiction to protect the defendant from an unjust trial.[32]

Where a court in the requesting state "would be *bound* to hold that a fair trial of the accused is now impossible", it will be unjust and oppressive to extradite.[33] Where the requesting state simply lacks what the court would regard as satisfactory safeguards, akin to the court's abuse of process jurisdiction, the court will have to make its own judgment as to the effect of delay.[34] But where there is an acceptable system for safeguarding the defendant's rights, the decision as to whether the trial would be unjust or oppressive due to the passage of time rests with the tribunal in the requesting state.[35] The court will be particularly unwilling to make fine decisions on the effect of delay on the availability and quality of the evidence.[36]

2. The effect of time

Time runs from the date of the alleged offence to that of the challenge.[37] The question is a factual one: the defendant must prove, on the balance of probabilities, those facts that he alleges give rise to injustice or oppression.[38]

It is not merely the fact that time has elapsed that may make extradition unjust or oppressive. Time is only relevant in how it has operated on the "cradle of events" that found the intended prosecution: "[i]t is not permissible … to consider the passage of time divorced from the course of events which it allows to develop".[39] Furthermore, "there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive".[40] Inexcusable dilatoriness by the requesting government may also be relevant,[41] especially in borderline cases,[42] but the requesting government must be shown to have been responsible

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32 *Woodcock* (n.26), [21].
33 *ibid.*
34 *ibid.*; see also *Beresford* (n.26), [22].
35 *Beresford* (n.26), [22].
36 *ibid.*, [24].
37 *ibid.*; see also *Re Davies* [1998] C.O.D. 1.
38 *Extradition Act* 2003, s.206; *Union of India v. Narang* [1978] A.C. 247 (U.K. House of Lords), 293-4. See also *Sirvelis v. Lithuania* [2005] EWHC 2611 (Admin), [2005] Extradition L.R. 118, [25].
39 *Kakis* (n.29), 790 (Lord Scarman).
40 *Woodcock* (n.26), [29].
41 *Kakis* (n.29), 785 (Lord Edmund-Davies), 787 (Lord Keith); *Narang* (n.38), 290 (Lord Fraser), 295 (Lord Keith).
42 *Hunt v. Court of First Instance, Antwerp, Belgium* [2006] EWHC 165 (Admin), [2006] 2 All E.R. 735, [24].

for the delay.[43] In any case, the defendant cannot rely on the passage of time caused "by the accused himself … fleeing the country, concealing his whereabouts or evading arrest".[44]

Where the requesting government's actions, and the passage of time, have led the defendant to believe he is safe from prosecution, and will not be extradited, it may be oppressive if the government then attempts to do so.[45]

D. Belize's approach

1. The law

Extradition, in Belize, is governed by a combination of the constitution and pre-independence British legislation. The *Constitution of Belize* 1981, s.5(1)(i), provides: "(1) A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say– … (i) … for the purpose of effecting his expulsion, extradition or other lawful removal from Belize". By section 134(1), existing laws remain in force save for modifications, *etc.*, necessary to bring them into conformity with the Constitution; such laws include the *Extradition Act* 1870 (U.K.), extended to Belize by Order in Council. In addition, section 3(a) of the *Constitution of Belize* provides for the right to "life, liberty, security of the person, and the protection of the law", and section 5(2)(d), to "the remedy by way of *habeas corpus* for determining the validity of his detention"; these rights are protected by application to the Supreme Court under section 20.

Section 11 of the 1870 Act gives the Minister for Foreign Affairs the exclusive power to decide whether extradition proceedings are an abuse of process.[46] The Belizean courts concluded that they had no power or discretion to examine this question.[47] Before the Privy Council, Fuller argued otherwise, as follows.

> "The *Constitution of Belize* provides for the separation of powers. It also provides for the protection of fundamental rights and freedoms, which reflect those protected by the *European Convention on Human Rights*. One of those rights is the right to personal liberty. *Habeas corpus* is the procedure by which the right to personal liberty is protected. Abuse of

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43 *Kakis* (n.29), 785 (Lord Edmund-Davies).

44 *Hunt* (n.42), 783. See also *Filipczak v. Poland* [2006] EWHC 2700 (Admin), [2006] Extradition L.R. 252.

45 *Kakis* (n.29), 790 (Lord Scarman). Indeed, this was at the core of Kakis' case: he believed there had been an amnesty in the interim; and he had returned to the country for a period, receiving a visa and an exit permit.

46 *Fuller* (n.1), [15]-[16].

47 *ibid.*, [16]-[17].

> process in extradition proceedings is capable of rendering the detention of the person whose extradition is sought unlawful. The separation of powers requires the courts and not the executive to rule on the legality of detention. It follows that, under the *Constitution of Belize*, the courts must have jurisdiction to consider abuse of process."[48]

The board, in assessing this argument, analysed relevant English and Welsh jurisprudence. They drew a contrast between what they termed the *Atkinson* line of cases, and the current approach, developed since the enactment of the *Human Rights Act* 1998.

In *Atkinson v. United States of America*,[49] their Lordships had held that, under the 1870 Act, once a magistrate decided that there was sufficient evidence to justify committal, he had no alternative but to commit. Although Parliament could not have intended to require extradition contrary to natural justice, this was to be safeguarded by the exercise of the Secretary of State's discretion not to extradite (as circumscribed by the relevant extradition treaty[50]), to whom the magistrate could report matters that might make extradition improper.[51] The Belizean courts had all applied *Atkinson*.[52]

The board contrasted this with the approach adopted since 2000,[53] when the *Human Rights Act* came into force, typified by the Divisional Court's judgment in *R. (Kashamu) v. Governor of Brixton Prison (No. 2)*.[54] In that decision, Rose L.J. had distinguished *Atkinson* on the ground that it was irreconcilable with the *Human Rights Act*: a court was the appropriate forum for the determination of the lawfulness of a fugitive's detention, but the Secretary of State retained a further discretion to refuse the extradition.[55] Such a determination includes entertaining a challenge to the proceedings on the ground of abuse of process;[56] indeed, under the *Extradition Act* 2003 (U.K.), the court must consider this of its own motion, if it has reason to believe its process may be being abused.[57]

In addition, the board examined briefly English and Welsh precedents on the separation of powers, finding the exclusion of the courts' jurisdiction in respect of judicial functions to be incompatible

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48 *ibid.*, [7].
49 [1971] A.C. 197 (House of Lords).
50 *Fuller* (n.1), [20].
51 *Atkinson* (n.49), 232.
52 *Fuller* (n.1), [25].
53 *ibid.*, [33]-[37].
54 [2001] EWHC 980 (Admin), [2002] Q.B. 887.
55 *ibid.*, [29].
56 *R. (Bermingham) v. Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] Q.B. 727.
57 *R. (U.S.A.) v. Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin), [2007] 1 W.L.R. 1157.

with the separation of powers under a Westminster model constitution – including powers to punish for contempt of court,[58] to determine when a young man convicted of murder should be released,[59] and to grant bail.[60]

The board adopted the approach taken in *Kashamu*, and distinguished *Atkinson* on like grounds.[61] Lord Phillips further stated clearly that "[a]buse of process is a paradigm example of a matter that is for the court and not for the executive",[62] and went to the legality of the extradition procedings.

As Fuller had applied to the Supreme Court under section 20 of the *Constitution of Belize* 1981, the board did not have to rule directly on the procedural interplay of that section with that court's section 5(2)(d) *habeas corpus* jurisdiction.[63] Nor did they give general guidance on when the Supreme Court should accede to a *habeas corpus* application – although they indicated that such circumstances "might extend further than those that can naturally be described as amounting to an abuse of process".[64] In respect of this case, they held that if Fuller could show that there had been an abuse of process, the Supreme Court could properly grant an application for *habeas corpus* "on the ground that it is contrary to justice that the court's process should be used in such circumstances".[65]

2. Fuller's case that there was an abuse of process

Fuller pleaded various matters as rendering it unjust and oppressive to extradite him to Florida. His key submissions were on delay:[66] both the overall delay in bringing him to trial, which, he said, would render impossible a fair trial in the United States; and the delay in the Belizean extradition proceedings. In respect of the former, the board clearly endorsed an approach similar to that in England and Wales: that, unless it is shown that a fair trial would be impossible, the effect of the delay on the fairness of the trial itself was not a matter for them, or the Belizean courts, but rather for the American courts.[67]

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58 *Ahnee v. D.P.P.* [1999] 2 A.C. 294 (Privy Council).
59 *D.P.P. of Jamaica v. Mollison* [2002] UKPC 6, [2003] 2 A.C. 411.
60 *Mauritius v. Khoyratty* [2006] UKPC 13, [2007] 1 A.C. 80.
61 *Fuller* (n.1), [51].
62 *ibid.*, [53].
63 *ibid.*, [50].
64 *ibid.*, [58].
65 *ibid.* Although it is beyond the scope of this case note, it is worth noting that they held that this jurisdiction did not extend to the Chief Magistrate, as s.20(3) clearly provides that it should be dealt with on application to the Supreme Court: *ibid.*, [59].
66 *ibid.*, [75]; see B.1., *ante*.
67 *ibid.*, [75].

As to the delay in the Belizean courts, the board cited *Gomes v. Trinidad and Tobago*,[68] which in turn had cited Lord Bingham's judgment in *Knowles v. United States*,[69] in which his Lordship had endorsed the Divisional Court's judgment in *Woodcock*.[70] Here, again, it was important that it could not be shown that a fair trial would be impossible.[71] Furthermore, the board put the six years' inertia after the filing of Fuller's appeal against the judgment of the Supreme Court of Belize down to the appellant. The file had sat with the registry of the court for that period; had Fuller wished to progress his appeal, he should have made representations to them.[72] He therefore could not rely on this delay as founding an abuse of process, as it was, in effect, of his own making. His appeal was therefore dismissed.

E. Fiji's approach

1. The law

The Fiji Islands' extradition regime is governed by their *Extradition Act* 2003. The magistrate hearing extradition proceedings must be satisfied of various facts before he may order that the accused be held in custody for a determination to be made.[73] The magistrate's decision may be appealed to the High Court.[74] The final "surrender determination" lies with a judge of the High Court,[75] who may refuse it on various procedural, factual, and legal grounds.[76] All extradition proceedings must be conducted in the same manner as criminal proceedings.

The accused may object to his or her surrender on various grounds;[77] these do not *prima facie* include abuse of process. The jurisdiction to stay criminal proceedings arises from the court's inherent powers to prevent abuse of its own process.[78] Abuse of process is not a sharply defined concept, encompassing the improper use of the court process (including inordinate delay therein), using the court process where it is improper to do so (as when the circumstances in which the accused is bought before the court are

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68 [2009] UKHL 21, [2009] 1 W.L.R. 1038.

69 [2006] UKPC 38, [2007] 1 W.L.R. 47 (on appeal from the Court of Appeal of the Commonwealth of The Bahamas).

70 (n.26.) See the discussion of the English and Welsh approach at C., *ante*.

71 As to which, see *Narang* (n.38), 276 (Viscount Dilhorne), quoted in *Gomes* (n.68), [33].

72 *Fuller* (n.1), [79].

73 *Extradition Act* 2003 (Fiji), s.15(1).

74 *ibid.*, s.17.

75 *ibid.*, s.18(1).

76 *ibid.*, s.18(2)-(5).

77 *ibid.*, s.4.

78 *Connelly v. D.P.P.* [1964] A.C. 1254 (U.K. House of Lords).

an affront to the rule of law), or to improper ends (such as political purposes).[79]

Delay so severe as to require a stay of the prosecution is very rare.[80] Such a permanent stay will only be granted where a fair trial is impossible.[81]

2. Maharaj's case that there was an abuse of process

Maharaj's various allegations of abuse of process were founded largely on the delay that had occurred in holding a trial in the United States.[82] In the High Court of Fiji – as in *Fuller*, and as would be in England and Wales – what was at issue was the nature of the extradition proceedings as an abuse, not the fairness of Maharaj's trial in the United States: "the court's exercise of discretion to stay is confined to the extradition proceeding".[83]

The High Court reviewed the various rights that Maharaj held under the Constitution of the United States, and held that there was no basis to conclude that his trial could not be fair.[84] The question of whether Maharaj's right to a speedy trial was violated was a question for the United States' courts.[85] As there was no evidence of abuse of process by either the United States or the Fijian authorities, Maharaj's application was bound to fail.[86]

F. Brief analysis

What is striking about these cases is not the novelty of the diverse courts' approach to delay as a bar to extradition; rather, it is the uniformity in their approach. In each jurisdiction, the key question is not whether it would be unjust or oppressive to *try* the accused, but whether it would be so to *extradite* him. The fairness or otherwise of the eventual trial is only relevant where it can be shown that it will not be possible for it to be fair; if so, then the extradition would be unjust or oppressive. The safeguards afforded the accused in the requesting jurisdiction will be relevant to the fairness of the eventual trial, which question is for the courts of that jurisdiction, not the

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79 *Maharaj* (n.14), [37], quoting *Fuller* (n.1), [5].

80 *Maharaj* (n.14), [39], quoting *Att.-Gen.'s Reference (No.1 of 1990)* [1992] Q.B. 630 (U.K. Court of Appeal), 644 (Lord Lane C.J.).

81 *Maharaj* (n.14), [40]; but *cf. R. v. Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 A.C. 42 (U.K. House of Lords), where a stay was granted for an abuse of power that so offended the court's sense of justice and propriety that it tainted the entire prosecution.

82 *Maharaj* (n.14), [38]; see B.2., *ante*.

83 *ibid.*, [41].

84 *ibid.*, [42].

85 *ibid.*, [43].

86 *ibid.*, [44].

extraditing court. The question of whether the passage of time renders a fair trial impossible, and therefore makes the extradition an abuse of process, will turn on the facts of each case. Where it appears that the delay is at least in part due to the accused's own actions, a stay is highly unlikely – even twenty-one years after the alleged offence.

ATLI STANNARD.*

ABUSE OF PROCESS – A TRIO OF COMMONWEALTH CASES

Warren and others v. Att.-Gen. for Jersey [2011] UKPC 10, [2011] 3 W.L.R. 464 (March 28, 2011)
Judicial Committee of the Privy Council

R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566 (June 24, 2011)
Supreme Court of Canada

Moti v. The Queen [2011] HCA 50 (December 7, 2011)
High Court of Australia

Police misconduct – Repudiation of plea agreement – Illegal deportation

A. Introduction

The power to stay criminal proceedings as an abuse of process has recently been considered by the Judicial Committee of the Privy Council in *Warren and others v. Att.-Gen. for Jersey*,[1] by the Supreme Court of Canada in *R. v. Nixon*[2] and by the High Court of Australia in *Moti v. The Queen*.[3] The subject was also touched on by the Supreme Court of the United Kingdom in *R. v. Maxwell*[4] (three of the judges being members of the board in *Warren*). In *Warren* and *Nixon* the respective courts ruled against a stay, but in *Moti* the High Court of Australia ordered a stay of the relevant proceedings. The grounds for claiming a stay will be familiar to criminal practitioners throughout the common law world: unlawful conduct by the police

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1 [2011] UKPC 10, [2011] 3 W.L.R. 464.

2 2011 SCC 34, [2011] 2 S.C.R. 566.

3 [2011] HCA 50.

4 [2010] UKSC 48, [2011] 1 W.L.R. 1837.

in obtaining evidence (*Warren*), the prosecution reneging on an agreement as to how to dispose of a case (*Nixon*), and state complicity in illegality in bringing the accused before the criminal court (*Mott*).

B. Warren and others v. Att.-Gen. for Jersey

In England and Wales, the conventional wisdom, prior to *Warren*, was that a criminal court could stay a prosecution in one of two situations: first, where a fair trial would be impossible; secondly, where it would be unfair to try the defendant. In *Warren*, the Judicial Committee of the Privy Council were concerned with an appeal from Jersey, a British Crown Dependency with its own legal and judicial systems, but with an ultimate right of appeal to the Privy Council. Accepting that the law relating to stays on the ground of abuse was the same in Jersey as in England and Wales, the board ruled that the second head is not concerned with fairness to the accused, but solely with the question whether the grant of a stay was necessary to protect the integrity of the criminal justice system.

1. Factual background

The case concerned an investigation by the Jersey police into a conspiracy to import a large quantity of cannabis into Jersey from the Netherlands. From intelligence received in 2007, the police were aware that one of the defendants, W., intended to travel by car from Jersey through France and Belgium to pick up the drugs in Amsterdam. With the consent of the Attorney-General, the police fitted tracking and audio monitoring devices to W.'s car. Whilst arranging to obtain the necessary consents from the relevant foreign authorities, the police received advice from a senior prosecutor in Jersey that it was unlikely that evidence obtained by way of an audio device would be excluded from any trial just because it had been unlawfully obtained. The three foreign authorities consented to the use of the tracking device, but the Dutch and French authorities would not consent to the use of the audio device. Shortly before W. was to travel, the police discovered his intention to hire a car in France. The officers obtained permission from the French authorities to install a tracking device in this car, but when fitting this device, they also fitted an audio device, and misled the French police that it was a simply a back-up to the tracker. W. drove the car to Amsterdam, during which audio material was obtained of conversations that provided persuasive evidence of the defendants' plans for the importation of the drugs into Jersey. The defendants were consequently charged with conspiracy to import the drugs.

The defendants applied for the proceedings against them to be stayed on the ground of abuse of process, contending that the only

evidence against them had been obtained through police misconduct. The commissioner, sitting in the Royal Court at a preparatory hearing, ruled against the application for a stay, and his findings were upheld by the Court of Appeal of Jersey. The defendants appealed on the issue of the refusal of a stay.

2. The balancing exercise

The board ruled that the assessment as to whether to grant a stay in the second category of case should focus on the integrity of the criminal justice system. It referred to Lord Steyn's judgment in *R. v. Latif and Shahzad*,[5] in which he described the law as "settled" (by *R. v. Horseferry Road Magistrates' Court, ex p. Bennett*[6]), and set out the relevant balancing exercise between the importance in prosecuting serious crime and the need to protect the propriety of the criminal justice system and maintain public confidence in it.[7]

The board referred[8] approvingly to Professor Choo's book *Abuse of Process and Judicial Stays of Criminal Proceedings*,[9] in which he sets out a number of factors relevant to the balancing exercise (the seriousness of any violation of the defendant's or any third party's rights, whether the police acted in bad faith or maliciously, or with an improper motive, whether the misconduct was committed in circumstances of urgency or emergency, the availability of any direct sanction against the miscreant, the seriousness of the offence charged). The board endorsed this as "a useful summary of some of the factors that are frequently taken into account by the courts when carrying out the balancing exercise referred to by Lord Steyn in *R. v. Latif*", but cautioned against reliance on a comprehensive list of factors in view of the "infinite variety of cases" that can arise.[10]

3. The "but for" test

The board went on to review the "but for" test, as advanced in *Panday v. Virgil (Senior Superintendent of Police)*,[11] but rejected by the majority in *Maxwell*. The test considers whether "but for" the existence of the particular misconduct in question, the incriminating evidence would have existed or the prosecution would have taken place. In his dissenting opinion in *R. v. Maxwell*, in which the Supreme Court had to address the issue of abuse in the context of a prosecution

5 [1996] 1 W.L.R. 104 (House of Lords).
6 [1993] UKHL 10, [1994] 1 A.C. 42.
7 *Shahzad* (n.5), 112H-113B.
8 *Warren* (n.1), [24].
9 (2nd edn, 2008), 132.
10 *Warren* (n.1), [25].
11 [2008] UKPC 24, [2008] 1 A.C. 1386 (an appeal from Trinidad and Tobago).

application for a retrial following the quashing of a conviction on the ground that the evidence upon which it was based was tainted by serious police misconduct, Lord Brown J.S.C. (who had delivered the judgment of the board in *Panday*) expressed the view that a stay would normally be appropriate where the "but for" test was satisfied.[12] The majority in *Maxwell* considered the "but for" test a relevant factor, but they did not see it as determinative of the question of whether there should be a trial (or retrial).[13] Whereas Lord Brown dissented in *Maxwell* on the ground that he thought the test satisfied, he concurred in *Warren* saying that, even if the "but for" test were to be applied, it would not be satisfied, and he explained that the difference between *Maxwell* and *Warren*, so far as he was concerned, was that whilst it was true of *Warren* that "but for" the police misconduct there would have been no prosecution, in *Maxwell*, "but for" the police misconduct, the prosecution would not have had the (post-conviction confession) evidence upon which they were proposing to rely at the retrial that they sought. In the one case, the defendants' conduct had not been affected by the police misconduct in any way. In the other, the defendant had acted to his detriment as a consequence of that misconduct. The board in *Warren* (including Lord Brown) accepted the majority approach in *Maxwell*.

4. R. v. Grant

To underline the undesirability of rigid classifications of certain situations as being likely to lead to a stay, the board also disapproved the view expressed by Court of Appeal of England and Wales in *R. v. Grant*[14] to the effect that a deliberate invasion of a suspect's right to legal professional privilege should generally lead to a stay a case. Although it may often do so, the particular circumstances of each case must be considered and carefully weighed in the balance.

5. The board's finding

In reaching its decision to dismiss the appeal and refuse a stay, the board set out five principal factors it relied upon in conducting the balancing exercise. First, the serious nature of the charges; secondly, the offending history of the ringleader who "was a professional drug dealer of the first order",[15] thirdly, the reckless advice of the senior prosecutor which, to some extent, reduced the severity of the police's misconduct; fourthly, that there was never any intention to conceal

12 *Maxwell* (n.4) [108].
13 *ibid.*, [26].
14 [2005] EWCA Crim 1089, [2005] 2 Cr.App.R 28.
15 *Warren* (n.1), [47] (Lord Dyson).

the misconduct from either the defence or the court; and fifthly, the urgency of action that the circumstances demanded. Whilst the board ruled against a stay, it emphasised the serious nature of the police's misconduct. This was, it stressed, a case where there would have been no trial without the evidence that had been obtained through the misconduct. In their supporting judgments, other members of the board[16] stressed that the dismissal of the appeal should not be taken as condoning the police's misconduct; on the contrary, the fact that they had been warned by the board not to repeat such conduct would be a factor to be taken into account in future proceedings in which a decision to stay had to be made.

C. R. v. Nixon

1. Factual background

R. v. Nixon concerned offences under the Canadian *Criminal Code* including dangerous driving causing death, where the appellant drove her motor-home through a road junction, striking another vehicle, killing a man and his wife, and injuring their young son. A roadside breath test revealed she was nearly three times over the legal alcohol limit at the time of the accident.

In the criminal proceedings, Crown counsel entered into a plea agreement in which it was agreed that the appellant would plead guilty to the lesser charge of careless driving and the Crown would withdraw the more serious *Criminal Code* charges. However, when the acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney-General learnt of the proposed agreement, he began his own inquiry. He subsequently disagreed with Crown counsel's assessment of the case and concluded that a plea to careless driving was not in the interests of justice and "would bring the administration of justice into disrepute."[17] Crown counsel was therefore instructed to withdraw the plea agreement and proceed to trial. The accused lodged an application under section 7 of the *Canadian Charter of Rights and Freedoms*,[18] citing abuse of process. The trial judge upheld the application and ordered the Crown to proceed with the original agreement. The Crown appealed to the Court of Appeal for Alberta who allowed the appeal. The defendant appealed to the Supreme Court.

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16 *ibid.*, [68] (Lord Hope), [71] (Lord Rodger), [81] (Lord Kerr).

17 *Nixon* (n.2), [10]. The unanimous judgment of the court was delivered by Charron J.

18 "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

2. Prosecutorial discretion and Krieger v. Law Society of Alberta.

Of central importance was whether the Crown's decision to resile from the plea agreement constituted prosecutorial discretion, which is only reviewable for abuse of process, or whether it was a "matter of 'tactics or conduct before the court'", and therefore subject to the court's intrinsic jurisdiction to govern its own process. In accordance with the principles in *Krieger v. Law Society of Alberta*,[19] the Supreme Court determined that prosecutorial discretion involved "the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for."[20] Matters peripheral to such decisions fell within the category of tactics and conduct.

The court viewed the decision to withdraw from the plea agreement as an act of prosecutorial discretion on the basis that it was a decision that the prosecution should be continued. The court emphasised that the discretion did not cease on the initiation of proceedings or upon the creation of the plea agreement but continued for the duration of the proceedings. In accordance with *Krieger*, the court held that the Crown's repudiation of the plea agreement and its decision to continue the prosecution was therefore only reviewable for abuse of process.

3. Abuse of process.

The court then set out the two heads of abuse of process established under section 7 of the *Charter*, and as identified in *R. v. O'Connor*.[21] The first concerns "prosecutorial conduct affecting the fairness of the trial",[22] where establishing prejudice to the necessary standard is key, and where proof of prosecutorial misconduct, while relevant, is not a prerequisite. The second concerns "prosecutorial conduct that 'contravenes fundamental notions of justice and thus undermines the integrity of the judicial process'".[23] Crucially, the court emphasised that abuse of process required a balancing exercise between the needs of society and the individual. The court then set out the correct test to be applied when considering an application to stay proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system. First, the trial process or its outcome must highlight, perpetuate or aggravate the prejudice resulting from the abuse in

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19 2002 SCC 65, [2002] 3 S.C.R. 372.

20 *Nixon* (n.2), [21].

21 [1995] 4 S.C.R. 411 (Supreme Court of Canada); there, the court noted the overlap with the common law, and ruled that the two regimes should therefore be merged.

22 *Nixon* (n.2), [36].

23 *ibid.*, citing *O'Connor* (n.21), [73].

question, and secondly, a stay must be the only remedy capable of eradicating the prejudice.[24]

The court observed that the appellant did not appear to be arguing that her right to a fair trial had been prejudiced. The court therefore resolved that the question to be determined was whether the withdrawal of the plea agreement fell under the second head of abuse. It took the view that an evidentiary burden should be imposed on an applicant who asserts that an act of prosecutorial discretion amounts to an abuse of process. In this case, the court was satisfied that evidence of a plea agreement, from which the Crown subsequently withdrew, met the burden required to permit the court to inquire into the circumstances. Furthermore, the court held that the burden then shifts to the Crown to provide an explanation as to the circumstances and reasons behind their decision to repudiate the agreement, although this does not detract from the applicant's ultimate burden to prove abuse in accordance with the strict test.

In determining whether the decision to withdraw the plea agreement constituted an abuse of process, the court stated it was necessary to review the circumstances surrounding that decision, and not the reasonableness of the decision to enter into the plea agreement; reviewing for reasonableness a decision made in the exercise of prosecutorial discretion runs contrary to the constitutionally separate role of the prosecutor. What had to be decided, therefore, was whether the Crown's conduct in repudiating the agreement was, in all the circumstances, so unfair or oppressive, or so tainted by bad faith or improper motive, that to allow the Crown to proceed would tarnish the integrity of the criminal justice system. The court concluded that there was no evidence to support a finding of abuse. In its view, the minister proceeded in good faith and his actions, in deciding that the Crown should resile from the plea agreement and continue the prosecution, and in bearing in mind the public interest and the seriousness of the offences, could "hardly be regarded as evidence of misconduct."[25] The court also observed that by virtue of the Crown's actions, the appellant found herself in the same position as she had been at the conclusion of the preliminary hearing and before the agreement was reached, and therefore was not prejudiced by the repudiation. The court stressed, however, that repudiation of a plea agreement was a "rare and exceptional event"[26] and its decision should not be viewed as a signal that such agreements could be overturned on impulse.

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[24] *Nixon* (n.2), [42], citing *Canada (Minister of Citizenship and Immigration) v. Tobiass* [1997] 3 S.C.R. 391 (Supreme Court of Canada), and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297.

[25] *Nixon* (n.2), [68].

[26] *ibid.*, [63].

D. Moti v. The Queen

1. Factual background

In *Moti*, the High Court of Australia considered whether criminal proceedings brought against the appellant, an Australian citizen residing in the Solomon Islands, in respect of allegations of sexual intercourse with a child under the age of 16 years, should be stayed as an abuse of process. The allegations concerned conduct said to have taken place in Vanuatu and in New Caledonia in 1997. The indictment contained seven counts of offences contrary to section 50BA of the *Crimes Act* 1914 (Cth). The Australian Government had made a formal extradition request to the Solomon Islands in December 2006, which had been refused.

Abuse of process was argued on two grounds. The first concerned the appellant's deportation from the Solomon Islands to Australia on December 27, 2007, which it was contended was a "'disguised extradition'",[27] and carried out illegally. It was further argued that by arranging a travel document to allow for the appellant's entry to Australia, Australian officials had conspired with the Solomon Islands to effect the "disguised" and illegal extradition and therefore proceedings against him should be stayed as an abuse. The second ground focussed on payments made by the Australian authorities to the complainant and her family, after the complainant indicated she would not cooperate any further with the prosecution "unless she and her family were brought to Australia and given 'financial protection'".[28] It was argued that these payments "brought the administration of justice into disrepute"[29] such that the proceedings should be stayed as an abuse.

The primary judge stayed the indictment as an abuse of process on the ground that the payments made constituted an "affront to the public conscience", and that the court should not tolerate the use of such means to ensure the desired end of continuing the prosecution. However, the Court of Appeal of the Supreme Court of Queensland set aside the stay. The defendant appealed to the High Court.

2. Payments to witnesses

The High Court was not persuaded that the proceedings should be stayed because of the payments that had been made by the Australian Federal Police to the complainant and members of her family. Given that the complainant and other witnesses had made statements to the police in advance of the request for payment, the court was satisfied that the payments were not intended, and did not, secure the

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27 *Moti* (n.3), [4] (French C.J.; Gummow, Hayne, Crennan, Kiefel and Bell JJ.).
28 *ibid.,* [13].
29 *ibid.*, [2].

complainant's evidence. The court was also satisfied that the payments were not illegal, or inconsistent with Commonwealth policies. The court rejected the argument that the appellant could not have a fair trial as a result of the payments made, emphasising the ability of the trial process to deal with any perceived unfairness through exploration of the payments in evidence and appropriate directions to the jury.

3. The appellant's removal to Australia

On December 24, 2007, a deportation order in respect of the appellant was issued by the Minister of Commerce, Industry, Labour and Immigration, and published in the *Solomon Islands Gazette*. The appellant then applied for urgent interim orders to suspend this order but his application was dismissed.

In setting out the chronology of events, the High Court pointed in particular to a cable sent on December 24 by the Acting High Commissioner in Honiara to Canberra, in which she reported back regarding her meeting with the permanent secretary responsible for immigration earlier that day. In the cable, she indicated that the Solomon Islands intended to deport the appellant the following day, December 25, and that in the permanent secretary's view the deportation was in accordance Solomon Islands' deportation legislation. But crucially she also pointed out that in accordance with the deportation legislation, the appellant had "seven days in which to appeal to the High Court before being deported in this manner".[30] She also asked for advice. The response was that the High Commission was authorised to issue a document of identity to the appellant in order to allow him to be deported to Australia. The High Commission issued such a document on December 27, 2007.

The court viewed this cable as critical. It focussed its attention on the steps taken by the Australian High Commission in Honiara, on instruction from Canberra, to issue travel documentation for the appellant (not requested by him) when the Acting High Commissioner knew that the Solomon Islands' officials intended to use the documentation to effect the deportation of the appellant on the same day of issue, and crucially, was aware that the appellant was entitled to seven days from December 24 in which to appeal the deportation order made on that day. The court stated that the Acting High Commissioner "was of the opinion, again rightly, that deporting the appellant on that day was not authorised by Solomon Islands law"[31] – an opinion which she had communicated to her superiors in Canberra.

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30 *ibid.*, [30]
31 *ibid.*, [43]

4. Abuse of process?

The court set out three basic propositions to be considered in relation to abuse of process. First, that for a trial of an indictable offence, the accused should generally be present.[32] Secondly, that when seeking the extradition of an individual to Australia to stand trial for offences contrary to Australian law but committed in another jurisdiction, the "principles of double criminality and speciality would ordinarily be applied",[33] whereas those principles are not engaged in the case of a person deported to Australia. Thirdly, that there are "two fundamental policy considerations",[34] the first of which is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike, and the second of which is that any failure to protect this function will result in a loss of public confidence caused by concern that the court's procedures may lend themselves to oppression and injustice.[35] It also emphasised the basic proposition "that the end of criminal prosecution does not justify the adoption of any and every *means* for securing the presence of the accused".[36]

In the court's view, the issue of abuse of process needed to be decided by focussing attention on the actions of the Australian officials. It distilled its observations down to three points. One, the knowledge of the Australian officials in Honiara and Canberra that the Acting High Commissioner believed the appellant's deportation was not lawful. Two, the view of the Acting High Commissioner "was obviously right" and therefore the deportation on December 27, 2007, was unlawful. Three, and critically, the actions of the Australian officials in their supply of relevant travel documentation for the appellant (and those accompanying him) "facilitated"[37] his illegal deportation, and those actions were done in the knowledge that the documents would be used at a time when that deportation was indeed illegal.

In the court's view these circumstances were in sharp contrast to those of *R. v. Staines Magistrates' Court and others, ex p. Westfallen*; *R. v. Same and others, ex p. Soper*; *R. v. Swindon Magistrates' Court and others, ex p. Nangle*,[38] heard by a Divisional Court of the High Court of England and Wales, and upon which the respondents relied. In *ex p. Westfallen* it had been argued, and ultimately accepted by the court, that the deportation of two individuals from Norway and their subsequent

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32 *ibid.*, [54] (and see *Lipohar v. The Queen* [1999] HCA 65, (1999) 200 C.L.R. 485).
33 *Moti* (n.3), [56].
34 *ibid.*, [57].
35 See *Williams v. Sputz* [1992] HCA 34, (1992) 174 C.L.R. 509.
36 *Moti* (n.3), [60].
37 *ibid.*, [65].
38 [1998] 1 W.L.R. 652 (Divisional Court).

arrest at Heathrow Airport, in London, was "undisguised deportation" rather than "disguised extradition",[39] the court also finding that there had been no impropriety on the part of the British authorities. In the court's view in *Moti*, "the critical observation"[40] was that the actions of the Australian officials assisted the progress of the appellant's deportation by removing him on December 27, 2007, when Australian officials in Honiara believed that deportation at that particular time was unlawful and informed officials in Canberra of this view.

The court therefore ruled in favour of a stay on the basis of the actions of the Australian officials. In a powerful opinion, the lone dissenter, Heydon J., highlighted his dissatisfaction with the uncertainty surrounding the rules applying to abuse of process. In particular, he pointed out that the respondent had accepted that the appeal should succeed if the appellant made out his case that the Australian authorities had connived in an unlawful deportation by the authorities in the Solomon Islands. This "assumed rule", as he called it, stemmed from the decision of the House of Lords in *ex p. Bennett*, *ante*. As he pointed out, however, the statements in *ex p. Bennett* did not even bind the lower courts, and they certainly did not bind the High Court of Australia. In a strong hint of frustration, he drew attention to the fact that it had been open to the respondent to attack those statements and that it had been in their interests to do so, yet they had not done so. As he observed, there was a long line of distinguished authority upon which they could have relied, from which the House of Lords had departed. In stressing his own view that a stay was not the resolution to the problem of official breach or misconduct, he referred to the view of Lord Lowry in *ex p. Bennett*,[41] who emphasised that the discretion to stay proceedings should not be used to convey "the court's disapproval of official conduct".[42] As Heydon J. asked: what then is the point of the assumed rule? The dissenting opinion also addressed the issue of public confidence in detail and suggested there are many fields of the administration of justice to which it is relevant, including the unsatisfactory nature of "granting too readily orders permanently staying criminal proceedings."[43]

E. Conclusion

The decision of the High Court of Australia in *Moti* seems somewhat at odds with the jurisprudence of the Supreme Court of Canada in *Nixon* and the Privy Council in *Warren*. Even if Australian officials

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39 *ibid.*, 656B.
40 *Moti* (n.3), [65].
41 [1993] UKHL 10, [1994] 1 A.C. 42.
42 *ibid.,* 74H.
43 *Moti* (n.3), [100] (Heydon J.)

had connived at illegality, the court seems to make a huge leap by concluding that the only possible remedy was a stay of the proceedings for abuse of process. Whilst it refers to the need to uphold public confidence in the process of criminal justice, it does not apply any consideration to the competing public interest in the prosecution of serious crime. Indeed, only Heydon J., in his dissenting judgment, refers to a "balancing test", albeit he questions what the applicable test is. But he also considers the public interest in prosecuting serious crime which appears to be overlooked by the majority. By contrast the Supreme Court of Canada in *Nixon* and the Privy Council in *Warren* are clear in their message that a stay of proceedings on the ground of abuse should be exceptionally rare. The conduct of the police in *Warren*, as compared to that of the Australian officials in *Moti* appears far more grave and serious. Yet the court in *Warren* clearly conducted a balancing exercise that carefully considered the misconduct concerned and its effect on the propriety of the criminal justice system against the serious nature of the charges involved and the need to prosecute serious crime. It is difficult to envisage either the Privy Council or the Supreme Court of Canada reaching the same view as the majority in the High Court of Australia. But, aside from the differing approaches, what this trio of authorities all highlight is that abuse of process is an area that demands regular guidance from the senior courts as to its definition and boundaries; and that anybody seeking to rein in the limits could do worse than by starting with the dissenting opinion of Heydon J. in *Moti*.

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EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF FUNDAMENTAL RIGHTS IN NEW ZEALAND & CANADA

Hamed and others v. The Queen [2011] NZSC 101
(September 2, 2011)
Supreme Court of New Zealand

R. v. Côté, 2011 SCC 46 (October 14, 2011)
Supreme Court of Canada

Surveillance – Police misconduct – Exclusion of evidence

A. Introduction

Whilst the police's ability to investigate crime depends upon their possession of coercive powers, such powers equip them to incur significantly upon fundamental rights, as protected in domestic and international law, in the course of investigations. This note examines the approach taken by the Supreme Courts of New Zealand and Canada to appellants seeking exclusion of evidence against them which was obtained through violation of their rights.

The New Zealand case of *Hamed and others v. The Queen*,[1] was a pre-trial appeal concerning rulings to admit prosecution evidence obtained by the police using, among other means, covert surveillance in the absence of legislative authority. The eleven appellants were accused of participating in military-style training camps and exercises using firearms and Molotov cocktails on land owned by various trusts associated with the Tuhoe (an "iwi" or "tribe") of New Zealand. They were charged with offences contrary to the *Arms Act* 1983, s.45(1)(b), of possession of weapons, and under the *Crimes Act* 1961, s.98A, with participation in an organised criminal group, aiming to seize Tuhoe land through serious acts of violence.[2]

In January 2007, the police obtained a warrant in anticipation of a training camp. Although their application mentioned stationary surveillance cameras, the warrant did not. Nonetheless, the police installed three cameras for a two-week period, maintained listening posts, and searched for evidence as they retrieved the cameras. They did likewise in relation to six further anticipated training camps during 2007. The evidence gathered, through direct physical searches of the land and video footage, showed the use of weapons and Molotov cocktails at four of the camps. This note concentrates upon the

1 [2011] NZSC 101.

2 *R. v. Bailey*, HC Auckland CRI-2007-085-7842 (December 15, 2009), [82]; *Hunt v. The Queen* [2010] NZCA 528, [2011] 2 N.Z.L.R. 499, [91].

Supreme Court's treatment of covert filming – the area in which the Supreme Court's judgment has proved most controversial and significant. In the wake of the judgment, the Prime Minister announced that there would be legislation "suspending" its effect. There quickly followed the *Video Camera Surveillance (Temporary Measures) Act* 2011, which is designed to avoid the collapse of other prosecutions which are reliant upon evidence from covert filming.

In the Canadian case of *R. v. Côté*,[3] the police "violated virtually every *Charter* right accorded to a suspect in a criminal investigation".[4] The appeal to the Supreme Court concerned the trial judge's decision to exclude the resultant evidence. The appellant called the emergency services on the evening of July 22, 2006, stating that she had found her husband injured. After he was taken to hospital, the police attended at the appellant's home. They stated that their purpose was to determine what had happened, and to ensure that the premises were safe, not mentioning their belief, on the basis of information from the hospital, that her husband was suffering from a gunshot wound. They began making "surveillance" notes, and inspected the interior and the exterior of the residence, thereby seeing what appeared to be blood on a gazebo and a hole in one of its windows. They established a security perimeter around the property, and took the appellant to the police station. When she inquired as to the reasons for this, the police said that she was an important witness. They asked her to write down her version of the evening's events. Having obtained warrants for search of the appellant's residence, the police found a rifle of the same calibre as the bullet recovered from the victim's skull, holes in the gazebo's mosquito screen and its interior and exterior windows, powder residue inside it, and shards of glass on the ground.

Over five hours after the police had arrived at her home, they warned the appellant as a witness to an attempted murder and advised her of her right to counsel. After speaking to a lawyer, she described the events to the police, was arrested for attempted murder, and cautioned. She was allowed to sleep for an hour, and was then interrogated throughout the day, reaffirming her right to silence over twenty times. She exhibited extreme anxiety about having the interrogation room closed, appeared exhausted, and from the outset of her interrogation requested a rest. The interrogation ended over twelve hours later, when she was advised of her husband's death and charged with second degree murder.

In both Canada and New Zealand – as elsewhere – the question of exclusion of evidence is a two-stage inquiry. First, the court

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3 2011 SCC 46.

4 *Côté* (n.3), [2].

determines whether the evidence was obtained unlawfully. Secondly, it considers whether to exclude the evidence. Whilst both stages were in issue in *Hamed*, the Crown in *Côté* had conceded that the evidence had been obtained unlawfully by the time the case reached the Supreme Court of Canada. The police's entry and various searches and seizures were unreasonable, contrary to section 8 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Detaining the appellant without explanation violated section 10(a) of the *Charter*. They also violated her rights to silence, and to the assistance of a lawyer, and obtained a statement that was not voluntary.

B. An unlawful search?

In *Hamed*, the High Court deemed the filmed surveillance to have been improperly obtained. The Court of Appeal disagreed, finding (i) that the police entries (including their retrieval of the films) were lawful pursuant to an implied licence, since the area was used for recreation by the public without apparent objection from the owners; (ii) that the physical searches and surveillance filming on the lands were authorised by warrants; and (iii) that installing a camera which filmed vehicle movements entailed trespass, but did not breach the protection against unreasonable search and seizure contained in section 21 of the *New Zealand Bill of Rights Act* 1990.

The New Zealand Supreme Court considered arguments as to the lawfulness of the searches on the basis of the validity of the warrants issued under section 198 of the *Summary Proceedings Act* 1957, the law of implied licence, and section 21 of the *Bill of Rights Act*. It was accepted by the Crown that even if the warrants were valid they could not authorise covert surveillance. The suggestion of an implied licence – either of the kind recognised in *Tararo v. The Queen*.[5] (lawful to approach a dwelling house to speak to the occupier), or from public recreational use of part of the land – was quickly rejected.[6] This note concentrates, therefore, on the Supreme Court's application of the *Bill of Rights Act*.

Section 21 of the *New Zealand Bill of Rights Act* 1990 protects "the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". Under section 5, "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". These

5 [2010] NZSC 157.

6 The Supreme Court of Canada gave equally short shrift to a similar argument in *Côté* (n.3), [12].

provisions are not separate inquiries: section 5 informs the application of "unreasonableness" in section 21.[7]

A number of potential confusions arise from the Supreme Court's use of the term "unlawful" in several overlapping senses. Unlawfulness pursuant to sections 5 and 21 of the *Bill of Rights Act* arises from a finding of "unreasonableness". On several occasions, however, the Supreme Court refers to the question of *whether unlawfulness entails unreasonableness*, which seems tautological if "unlawfulness" here means "unlawfulness pursuant to the *Bill of Rights Act*". In this context, the word "unlawful" really refers to absence of statutory authority. In this note, for the sake of clarity, when discussing the lawfulness of police action, the labels "absence of statutory authority," "unreasonableness," and "trespass" are used, as appropriate. Only when discussing the exclusion of evidence is the general label of "unlawfulness" used.

1. *Section 21 of the Bill of Rights Act as permissive?*

The court considered whether section 21 of the *Bill of Rights Act*, by prohibiting *unreasonable* search or seizure, impliedly authorises *reasonable* search and seizure. Elias C.J. found that section 21 was a constraint, not an authorization, and dismissed the related argument that implied police powers permitted covert filming. Her analysis clearly illuminated the deep links between traditional common law principles and human rights protections. The principle of legality, she held, required that police powers be conferred expressly, because at common law, public bodies do not possess the liberties of private citizens:

> "While government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals – that they may do everything which is not specifically forbidden – with the powers of public officials, where the opposite is true. Any action they take must be justified by a law which 'defines its purpose and justifies its existence'."[8]

This lack of equivalence between the subject and public authorities, for Elias C.J., is a necessary condition of the liberties of

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[7] As Blanchard J. stated, if a search is unreasonable under section 21, there is no need to carry out further analysis under section 5.

[8] Woolf, Jowell and Le Sueur (eds), *De Smith's Judicial Review* (6th edn, Sweet & Maxwell 2007), para.5-025; see *Hamed* (n.1), [25]. Elias C.J. considered, therefore, that "[w]here public authorities are not authorised to interfere with the subject, he has liberties" (referring to *Halsbury's Laws of England* (4th edn, 1974) vol. 8, "Constitutional Law", [828]; (3rd edn, 1954) vol. 7, "Constitutional Law", [416]).

the subject, and affording equivalent liberty for public authorities would destroy individual liberty.[9] She strongly criticised New Zealand Court of Appeal authority to the contrary in *R. v. Fraser*[10] and *R. v. Gardiner*,[11] for failing to consider relevant authority (*Herbert v. Allsop*[12] or *Transport Ministry v. Payn*[13]). Elias C.J. also dismissed the view that sections 5 and 21 of the *Bill of Rights Act* differ from article 17 of the *International Covenant on Civil and Political Rights* ("*ICCPR*"), and the similar provisions of article 8 of the *European Convention on Human Rights*, as to the need for authority of enacted law. Section 21, she held, gives effect to article 17 of the *ICCPR*.[14] The Court of Appeal had also erred, she held, in applying *Malone v. Metropolitan Police Commissioner*,[15] the much criticised United Kingdom decision, decided prior to the enactment of the *Human Rights Act* 1998 in the United Kingdom, with which the European Court of Human Rights disagreed in *Malone v. United Kingdom*.[16]

2. Lawfulness and reasonableness

On one view, Elias C.J.'s analysis as described thus far could simply demonstrate the lack of statutory authority (or other formal legal authority) for covert surveillance. Blanchard J.'s account of section 21 is aptly described thus – as is the government's position as indicated by the *Video Camera Surveillance (Temporary Measures) Act* 2011. However, Elias C.J. went further, finding that absence of specific authority in the law of New Zealand for covert surveillance *itself* rendered the actions of the police unreasonable. Noting that this was in line with Canadian jurisprudence, she held that "it cannot be reasonable for law enforcement officers to act unlawfully" (*i.e.*, in the absence of statutory authority), and the threshold of "unreasonable search by state actors bound by the *Bill of Rights Act* is

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9 *Hamed* (n.1), [27].

10 [1997] 2 N.Z.L.R. 442 (Court of Appeal).

11 (1997) 15 C.R.N.Z. 131 (High Court, Christchurch).

12 [1941] N.Z.L.R. 370 (Supreme Court).

13 [1977] 2 N.Z.L.R. 50 (Court of Appeal).

14 Article 17 provides that no one is to be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". Elias C.J. referred to United Nations Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), which states that the "[i]nterference [with article 17] authorised by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant", and that article 17 applies to "[s]urveillance, whether electronic or otherwise", as well as "interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations". See *Hamed* (n.1), [18].

15 [1979] Ch. 344 (High Court, Chancery Division).

16 (1985) 7 E.H.R.R. 14 (European Court of Human Rights).

accordingly properly drawn at the extent of lawful powers conferred for investigative purposes by statute."[17] In other words, the police, as state actors, are creatures of law. For the police to act outside of sufficiently specific legal provision would be a denial of their very nature as police.

Elias C.J. also referred to the will of Parliament. She noted that many powers of entry, search, and seizure had been provided in statute, but none for secret surveillance of the type undertaken here, despite the absence thereof having been highlighted by the Court of Appeal and the Law Commission.[18] Elias C.J. argued that the decision as to whether a type of search or seizure was reasonable should be Parliament's, for three overlapping reasons: first, Parliament is better placed to consider what is necessary in a democratic society; secondly, it is a better indicator of community expectations; and thirdly, avoidance of *ex post facto* rationalisation of police actions.

This brought the Chief Justice into direct confrontation with the government. Without specifying a jurisprudential source, the commentary to the *Video Camera Surveillance (Temporary Measures) Bill* (since enacted) stated that "[b]efore the *Hamed* decision, the use of covert video camera surveillance by state agents had been […] permissible under common law". In further implied criticism, the commentary then noted that the Law Commission's report was "issued prior to three Court of Appeal decisions that we are advised affirmed the lawful use of such surveillance".

In contrast to Elias C.J., Blanchard J. found that, although lack of statutory authority would normally give rise to a finding of unreasonableness pursuant to section 21, this was not necessarily so. In his view, additional factors for consideration included the reason for the search, the nature of the place and object of the search, and the degree of intrusiveness involved.

Whilst both judges arrived at the same outcome – that covert filming was unreasonable and thus in contravention of section 21 of the *Bill of Rights Act* – it is submitted that the better view is that of the Chief Justice. Her analysis rests entirely upon a convincing account of the principle of legality, and of the constitutional status of public bodies. Blanchard J., on the other hand, compromises these fundamental principles on the basis of "additional factors", the nature of which seem directed at little more than police expedience.

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17 *Hamed* (n.1), [51].

18 *R. v. Gardiner* (1997) 4 H.R.N.Z. 7 (Court of Appeal); New Zealand Law Commission, *Search and Surveillance Powers* (NZLC R97, 2007), para.11.9.

C. Exclusion of evidence as a remedy

In both New Zealand and Canada, evidence obtained through an unlawful search may, nevertheless, be admitted in some circumstances. In New Zealand, section 30 of the *Evidence Act* 2006 requires exclusion of "any improperly obtained evidence [proffered by the prosecution] if […] its exclusion is proportionate to the impropriety". Section 24(2) of the *Canadian Charter* requires exclusion of evidence obtained in violation of *Charter* rights if admission "would bring the administration of justice into disrepute". Elias C.J., in the Supreme Court of New Zealand described the task as not simply balancing the impropriety against the need for an effective system of justice, but rather avoiding bringing the system of justice into disrepute, thus showing the mutual relevance of the two jurisdictions' approaches to exclusion. Interestingly, she also averred that the proportionality requirement demanded that a court's own reasoning in the balancing process be transparent and explicit.

Section 30(3) of the New Zealand *Evidence Act* lists, non-exhaustively, factors for consideration in assessing proportionality. Canadian jurisprudence refers to three groups of considerations: (i) seriousness of the state conduct; (ii) impact of the breach on the *Charter*-protected interests of the accused; and (iii) society's interest in adjudication of the case on the merits.[19] Both courts noted that some of these considerations might be capable of militating in favour of either exclusion or inclusion of the evidence concerned, depending upon the context of the case concerned,, and that some may exert an impact only in combination with others.

In *Hamed*, the Court of Appeal overturned the High Court's exclusion of the evidence obtained through covert surveillance. In *Côté*, the Court of Appeal for Quebec found that, whilst the trial judge was right to exclude the appellant's statements to police, he had erred in excluding the police's observations of the exterior of her home before the warrants were issued, and the physical evidence obtained at her home in execution of the warrants.

1. Appropriateness of remedy[20]

The New Zealand Court found that no remedy other than exclusion of the evidence could deal with the particular nature of the wrong

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19 *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, [71].

20 Section 30(3)(f) of the *Evidence Act* mentions appropriateness of exclusion, as compared to any other remedy, as a factor to consider. Although not part of these categories, appropriateness of exclusion as a remedy is a material consideration in Canada, as article 24(1) of the *Charter* also states that anyone whose *Charter* rights have been infringed "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

caused by the police unlawfully having obtained evidence for use in a criminal trial. It specifically found that compensation – as an alternative remedy to exclusion of evidence – would give the impression that the state could violate fundamental rights, as long as it then paid in financial terms, and that this would bring the justice system into disrepute.

2. Seriousness of impropriety and impact on relevant interests

Both courts considered the seriousness of the state's conduct, and its impact on the appellants' rights. Whilst these issues are intertwined, they were kept distinct by the Supreme Court of Canada, given their separation in the Canadian jurisprudence (*ante*).[21]

The majority in the New Zealand Supreme Court emphasised the deliberate nature of the breaches. McGrath J. thought that because the law on this point was previously unclear, the deliberate nature of the breach did not aggravate the impropriety. Gault J. thought that the intrusion on the rights of the accused was no more serious than it was in relation to searches pursuant to warrant. There was no such dispute in the Supreme Court of Canada. It found that the Court of Appeal for Quebec had violated the applicable standard of review in overturning the trial judge and finding that the police had not intended to act in an abusive manner.[22]

Turning to the effect upon those whose rights were violated, the majority of the Supreme Court of New Zealand found that the breaches in *Hamed* impacted significantly upon human rights. Covert filming diminished the appellants' dignity, and this was aggravated by the failure of the police to recognise the "tikanga" (culture, customs, *etc.*) of the Tuhoe. The Supreme Court of Canada stressed that the unauthorised search occurred in the appellant's home (where citizens have a very high expectation of privacy) in the middle of the night; that it was not brief; and that it occurred without lawful authorisation.[23] It found that this impacted significantly upon her right to privacy, as well as her liberty and her dignity.

Both courts (and especially the Supreme Court of Canada) considered whether, notwithstanding the breaches, the same evidence could have been obtained without violating fundamental rights. In the Supreme Court of New Zealand, the majority thought that absence of an alternative investigatory technique pointed, albeit weakly, towards reasonableness of the police misconduct, and to

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21 The Canadian judges noted that the seriousness of the impact on the accused's *Charter*-protected interests will not always mirror the seriousness of the breach: see *Côté* (n.3), [73].

22 *Côté* (n.3), [37], [50].

23 *ibid.*, [85].

admission of the evidence.[24] Only Elias C.J. found clearly that it increased the gravity of the impropriety.[25]

The Canadian Supreme Court recognised that its own decisions in *R. v. Grant* and *R. v. Harrison* [26] had changed the law in this area. Previously, under the "trial fairness rationale", the key consideration had been that evidence derived from unconstitutional self-incrimination undermined the presumption of innocence and the notion that the accused is not a compellable witness.[27] The possibility that the evidence could have been discovered without the accused's participation attenuated this effect, and often led to admission.[28] *Grant* established a more flexible, "multi-factored" approach, in which the key question is whether admission would bring the administration of justice into disrepute.[29] The Supreme Court in *Côté* agreed with the Court of Appeal for Quebec's findings that "discoverability" ("where unconstitutionally obtained evidence … could have been obtained by lawful means had the police chosen to adopt them"[30]) retains a useful role, and that it could "cut both ways".[31] If the police had exhibited good faith or had a legitimate reason for not seeking prior judicial authorisation, "discoverability" may lessen the seriousness.[32] If a warrant *could* have been obtained, there is less intrusion upon the individual's reasonable expectation of privacy,[33] although there would, however, still be an infringement, as reasonable expectations include the expectation of prior judicial authorisation.[34] On the other hand, if the police exhibited a casual attitude towards, or deliberately flouted, *Charter* rights, "discoverability" would aggravate the seriousness of their conduct.[35]

The Supreme Court disagreed with the Court of Appeal in its application of these principles to the facts of *Côté*. The seriousness of the police's misconduct, and its impact on the appellant's rights, were aggravated by their failure to take the opportunity to obtain a warrant.[36] In finding that the circumstances at the time of the

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24 *Hamed* (n.1), [246] (Tipping J.), [274] (McGrath J.).
25 *Hamed* (n.1), [73] (Elias C.J.).
26 *Grant* (n.19), and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.
27 *R. v. Collins* [1987] 1 S.C.R. 265 (Supreme Court of Canada). See also *R. v. Stillman* [1997] 1 S.C.R. 607 (Supreme Court of Canada).
28 *Côté* (n.3), [64].
29 *ibid.*, [62], [65].
30 *ibid.*, [66].
31 *ibid.*, [68], [70]. The Supreme Court referred, by way of illustration, to *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631.
32 *ibid.*, [71].
33 *ibid.*, [65], [69], [72]. *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, is an example.
34 *Côté* (n.3), [73].
35 *Côté* (n.3), [67].
36 *ibid.*, [82], [84].

application (the emergency telephone call and the direction of entry of the bullet into the deceased's head) justified the issuance of a warrant, the Court of Appeal had failed to address the trial judge's conclusion that, after discounting unconstitutionally obtained material from the warrant application, the remainder was insufficient.[37] The Supreme Court stated that "the question of exclusion must not be approached in a compartmentalized fashion".[38] The totality of the search process was tainted by the unconstitutional searches that preceded the warrants,[39] and "there had been multiple, serious and deliberate breaches" which showed a systemic disregard for the appellant's *Charter* rights.[40]

3. The interests of society

The third line of inquiry in *Grant* is society's interest in an adjudication on the merits: whether the truth-seeking function of the criminal process would be better served by admission or exclusion of the evidence. The Supreme Court of New Zealand in *Hamed* also placed considerable weight on this. Both courts considered, in particular, the reliability of the unlawfully obtained evidence, its importance to the prosecution's case, and the seriousness of the alleged offences.[41]

3.1. Reliability

The Supreme Court of New Zealand found, unanimously, that covert video surveillance provided presumptively reliable evidence, and that this, in general, favours its admission.[42] Elias C.J. noted, however, that if interpretation were required, by the court or an expert witness, this could compound the breach. In *Côté*, the Supreme Court of Canada was content that, although not explicit in the trial judgment,

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37 *ibid.*, [38], [75], [78].

38 *ibid.*, [79]. It found this approach consistent with well-established case law, including *Grant*.

39 *ibid.*, [78]. It also found that there was a "clear[…] connection between the earlier breaches and the evidence obtained pursuant to the warrants" *ibid.*, [79].

40 *ibid.*, [81]. The trial judge had emphasised that the violations of the appellant's rights were the result of "a larger pattern of disregard for the appellant's *Charter* rights": [346], citing *R. v. Greffe* [1990] 1 S.C.R. 755 (Supreme Court of Canada), 796.

41 See *R. v. Grant*; *Evidence Act* 2006, section 30(3)(c), (d). Section 30(3)(c) of the *Evidence Act* 2006 refers to "the nature and quality of the improperly obtained evidence" as a factor for consideration in relation to possible exclusion. The Supreme Court of Canada likewise stated that reliability of the evidence is a key factor: see *Côté* (n.3), [47].

42 *Hamed* (n.1), [80], [201], [236], [276]; the judges refer variously to *R. v. Shaheed* [2002] 2 NZLR 377 (Court of Appeal), [151], (Richardson P., Blanchard and Tipping JJ.), and *R. v. Williams* [2007] NZCA 52, [2007] 3 N.Z.L.R. 207, [140] (William Young P., Glazebrook J.).

the judge had been "fully aware of the nature of the evidence that was the subject of his order of exclusion".[43] It noted that the trial judge's decision predated the Supreme Court's judgment in *Grant* and thus may have been couched in different terms.[44]

3.2. Importance of the evidence to the prosecution's case

There was disagreement in the New Zealand Supreme Court as to whether importance of the evidence to the prosecution's case was a separate factor – see Blanchard J. – or whether it was subsumed within "quality" of the evidence under section 30(3)(c) – see McGrath J. Tipping J. considered it not to be relevant at all, "nature and quality" being "limited to the character of the evidence itself".[45] He was concerned about the temptation for investigating agencies to breach rights in order to obtain evidence, and then claim it should be admitted as central to the prosecution case.[46] Blanchard J. noted that, although the centrality of the evidence to the prosecution is not listed in section 30(3), the list is not exhaustive, and this factor had been deemed relevant in the jurisprudence, in particular in *Shaheed* and *Williams*,[47] as well as in the Canadian case of *Grant*.[48]

In *Côté*, the Supreme Court of Canada found no such dispute, and deemed importance of the evidence to the prosecution's case a key factor because "[a]dmitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to 'gut' the prosecution's case".[49]

3.3. Seriousness of alleged offence

The Supreme Court of Canada cautioned against relying heavily upon the seriousness of the alleged offence, as this would "deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify

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43 *Côté* (n.3), [55].
44 *ibid.*, [55].
45 *Hamed* (n.1), [237].
46 *ibid.*
47 n.42.
48 n.19; see *Hamed* (n.1), [201].
49 *Côté* (n.3), [47].

the means"'.[50] It also noted, citing *Grant*, that the seriousness of the offence will not always favour admission.[51]

The New Zealand Supreme Court agreed with each of these points, Blanchard J. and Tipping J. likewise citing *Grant*.[52] In addition, Elias C.J. held that some factors, such as seriousness of the offence, may be significant only in combination with others.[53]

As to the means by which seriousness was assessed on the facts, Tipping J. considered himself "confined to the generic seriousness of the charges, as demonstrated by their maximum penalties" because to conduct the assessment "ahead of trial, on the basis of the Crown's allegations, would be at least potentially a difficult and prejudicial exercise".[54] He thereby rejected the notion that, as a guideline, an offence could be considered serious if the sentencing starting point for the relevant accused was likely to be four years' imprisonment or more – one aspect of the leading Court of Appeal case of *Williams*.[55] Seriousness, he held, is not absolute, but comparative.[56] Although this rejection of *Williams* was a minority position, Blanchard J. and McGrath J. considered that the maximum penalties were the principal factor to consider in relation to seriousness of the offence.

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[50] *ibid.*, [48], referring to *Harrison* (n.26), [40], and citing the Ontario Court of Appeal's judgment in *R. v. Harrison*, 2008 ONCA 85, (2008) 89 O.R. (3d) 161, [150] (Cronk J.A., dissenting).

[51] *ibid.*, [53], referring to *Grant* (n.19), at [84].

[52] *Hamed* (n.1), [60], [187], [230].

[53] *ibid.*, [65].

[54] *ibid.*, [238].

[55] (n.42); see *Hamed* (n.1), [240], [241].

[56] *ibid.*, [240], [241]

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SELF-INCRIMINATION AND THE RIGHT TO LEGAL ADVICE: A SPATE OF SCOTTISH CASES

Cadder v. H.M. Advocate
(H.M. Advocate General for Scotland and another intervening)
[2010] UKSC 43, [2010] 1 W.L.R. 2601 (October 26, 2010)

Ambrose v. Harris (Procurator Fiscal, Oban);
H.M. Advocate v. M.; *H.M. Advocate v. G.*
[2011] UKSC 43, [2011] 1 W.L.R. 2435 (October 6, 2011)

H.M. Advocate v. P.
[2011] UKSC 44, [2011] 1 W.L.R. 2497 (October 6, 2011)

McGowan (Procurator Fiscal, Edinburgh) v. B. [2011] UKSC 54,
The Times, November 25, 2011 (November 23, 2011)

Jude v. H.M. Advocate; *Hodgson v. H.M. Advocate*;
Birnie v. H.M. Advocate [2011] UKSC 55, (November 23, 2011)

United Kingdom Supreme Court

Right to legal advice – Privilege against self-incrimination – Right to fair trial

In *Salduz v. Turkey*, the Grand Chamber of the European Court of Human Rights found that access to a lawyer should be provided, as a rule, "from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."[1] In five judgments in cases originating in Scotland in little over a year, the United Kingdom Supreme Court has wrestled with the consequences of *Salduz* for Scotland, although the issues at stake have also had relevance for England and Wales. This process has been punctuated by further decisions from the Strasbourg court. In the context of the wealth of (at times conflicting) material, this casenote provides an overview of the relevant United Kingdom rulings, and then goes on to focus in greater detail on the reasoning in the two core cases of *Cadder* and *Ambrose*.

A. Cadder

A suspect interviewed under caution by two police officers made a number of admissions with regard to offences with which he was later charged. He had declined the option (available under Scottish

1 49 E.H.R.R. 421(19), [55].

law) to have intimation of his detention sent to a solicitor. Also in accordance with Scottish law, he was not permitted (but nor did he request) the opportunity to consult a solicitor. His admissions in interview were given in evidence at trial, and he appealed to the Supreme Court on the basis that the prosecution's reliance on admissions made by him without access to legal advice gave rise to a breach of his right under Article 6(3)(c) of the European Convention on Human Rights. Although the overall safeguards afforded to suspects in Scotland were to some extent superior to those offered in England and Wales (*e.g.* requirement of corroboration, no adverse inferences from silence, stricter limits on detention time), the justices of the Supreme Court were unanimous in allowing the appeal, with far-reaching consequences for the Scottish criminal justice system. The decision did not have the same impact in England and Wales, where access to a lawyer was already provided on arrest in the usual course of events.[2] The case itself was remitted to the High Court of Justiciary, Scotland's highest court, for that court to determine whether there was a real possibility that the jury would have arrived at a different verdict had they not had the defendant's admissions before them.

In one of the two leading judgments, Lord Hope said that the effect of *Salduz* was that contracting states "are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning".[3] Accordingly, the giving in evidence of any admissions made during such questioning where the suspect had not had access to legal advice would violate Article 6(3)(c). He also noted that "the *Salduz* principle cannot be confined to admissions made during police questioning. It extends to incriminating evidence obtained from elsewhere as a result of lines of inquiry that the detainee's answers have given rise to."[4] Finally, he rejected the approach of Judges Bratza, Zagrebelsky, Casadevall and Türmen set out in their concurring opinions in *Salduz*, which was that access to legal advice should be provided from the first moment that a suspect is taken into custody.

In the other leading judgment, the late Lord Rodger emphasised that *Salduz* confirms a suspect's right to legal assistance from the initial stages of policing questioning, and that the right is derived from the need to protect the privilege against self-incrimination[5]

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2 Under the *Police and Criminal Evidence Act* 1984, s.58.
3 *Cadder* (n.2), [49].
4 *ibid.*
5 *ibid.*, [70].

(a point also made by Lord Hope[6]). Lord Rodger went on to explain that the various safeguards provided to detained suspects in Scotland, although extensive, were really beside the point when it came to considering whether Article 6(3)(c) was violated, because only safeguards designed to protect the right not to incriminate oneself would be relevant.[7]

This was even more clearly expressed by Lord Brown in his brief, concurring judgment, where he said:

> "The critical point can, I think, be comparatively shortly made. The Strasbourg jurisprudence makes plain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence and is safeguarded (perhaps most obviously by the video recording of any interviews) against any possibility that by threats or promises of one sort or another he may nonetheless be induced against his will to speak and thereby incriminate himself. It is imperative too that before being questioned he has the opportunity to consult a solicitor so that he may be advised not merely of his right to silence (the police will already have informed him of that) but also whether in fact it is in his own best interests to exercise it: by saying nothing at all or by making some limited statement."[8]

B. Ambrose

All three cases in *Ambrose* turned on admissions that had been made by suspects during police questioning that took place outside the police station, such that the facts were distinguishable from *Cadder* and *Salduz*. The Supreme Court justices in *Ambrose* returned a majority judgment that neither *Cadder* nor *Salduz*, nor any subsequent Strasbourg authority, created an absolute rule that access to a lawyer must be provided to a suspect before questioning where the suspect is neither in custody nor his freedom of action significantly curtailed. In his leading judgment, Lord Hope said that the privilege against self-incrimination is not an absolute right[9], that a suspect's right to remain silent can adequately be protected by cautioning him (as is the case in England, Wales and Scotland), provided that answers are not then extracted from him by unfair means, and that the reason why the right of free access to a lawyer should only become absolute (subject to exceptional circumstances) at the point of detention (as is also the case in England and Wales, and, post-*Cadder*, Scotland) is that this is

6 *ibid.*, [35].
7 *ibid.*, [73].
8 *ibid.*, [108].
9 *Ambrose* (n.3), [34].

when the circumstances surrounding the questioning are likely to become particularly oppressive and intimidating.[10] Where a suspect has been "charged" for the purposes of Article 6(1) (right to fair trial), but has neither been detained nor had his freedom of action significantly curtailed, a court would need to consider whether, taking all the circumstances into account, it would be fair to admit evidence of admissions made by the suspect. The fact that he did not have access to legal advice would be no more than a material consideration. A suspect would be "charged" for these purposes where his situation had been "substantially affected", which would be the case once he became a suspect and was subjected to the initial stages of interrogation, which in turn was likely to be the moment where the police would have reason to think that questions might elicit incriminating responses.[11]

The position in the United States, set out by the Supreme Court of the United States in the seminal case of *Miranda v. Arizona*[12], played a significant role in the decision of the majority, as did *Zaichenko v. Russia*[13], a Strasbourg case which succeeded *Salduz*. In *Zaichenko*, a failure to provide access to a lawyer before questioning a suspect outside the police station was found not to violate Article 6, because there had been no significant curtailment of the suspect's freedom of action (even though the suspect, who was questioned during a stop and search, was not free to leave). In the result, however, admissions made by the suspect during this questioning should not have been admitted because the suspect had not validly waived the privilege against self-incrimination. In light of *Zaichenko*, Lord Hope decided that the *Salduz* principle applied to only one of the references before him, where the suspect who had been questioned in his own home had effectively been a detainee (or had his freedom of action significantly curtailed), since he had been handcuffed using force. Lord Hope ruled that he would remit the remaining two cases, where the accused had not had their freedom of action curtailed, to the High Court of Justiciary for that court to determine whether, in all the circumstances, it would be fair to admit evidence of the admissions.

Lord Brown delivered a concurring judgment, expressing his surprise that his own "brief judgment in *Cadder* is sought to be prayed in aid … of the contention … that the principle against self-incrimination requires a suspect to be given access to legal advice before he is first questioned"[14] and stating that *Salduz*'s core concern

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10 *ibid.*, [57].
11 *ibid.*, [62]-[65].
12 (1966) 348 U.S. 436.
13 Unreported, February 18, 2010.
14 *Ambrose* (n.3), [80].

was to guard against "'abusive coercion' and that miscarriages of justice should be prevented".[15] Lord Dyson also concurred, as did Lord Matthew Clarke, who pointed out (quoting Alito J. in *J.D.B. v. North Carolina*[16]) that a core virtue of applying the right at the point of detention is its clarity and certainty[17] and also noted "the difficulty that can arise in relation to defining precisely at what point in time someone becomes a suspect, as opposed to being a witness or a detained person".[18]

Lord Kerr, on the other hand, dissented. For him, given that the right of access to a lawyer derives from the privilege against self-incrimination, it should be activated at the first moment there is a risk that self-incriminating statements might be made, which is when a suspect is first interrogated by the police, irrespective of his geographical location.[19] This was clear from *Salduz*[20], and if and in so far as *Zaichenko* was at odds with *Salduz*, that was because *Zaichenko* was decided on its own particular facts.[21] There was no reason to suppose that a person questioned by police while not in detention would not experience the same need to acquiesce in the power of the police to require answers to potentially highly incriminating questions; and a coercive atmosphere was as likely to occur outside a police station as within.[22] Finally, an absolute rule would not prevent the police from obtaining self-incriminating statements from an unadvised, undetained suspect. It would merely prevent them from adducing those statements at trial. This mitigated the practical implications for the police of applying an absolute rule outside the police station.[23]

C. H.M. Advocate v. P.[24]

The background to this case, which at the time of judgment had not gone to trial, was that a defendant on charges of assault and rape had said in interview that on the date of the alleged incident he had taken a powered substance that had provoked an adverse reaction. He thought that his friend would be able to corroborate his adverse reaction. When the police took a statement from the friend, the friend supported the defendant's story, but also mentioned that the

15 *ibid.*, [80].
16 564 U.S. _ (2011) (Supreme Court of the United States).
17 *Ambrose* (n.3), [118].
18 *ibid.*, [116].
19 *ibid.*, [131]-[135].
20 *ibid.*, [136]-[142].
21 *ibid.*, [149]-[165].
22 *ibid.*, [148].
23 *ibid.*, [170].
24 [2011] UKSC 44, [2011] 1 W.L.R. 2497.

defendant had told him in a telephone conversation that, on the date in question, he had met and had consensual sexual intercourse with a woman. The question was whether the fact that the defendant had not had access to legal advice before giving the interview in which he referenced his friend meant that to admit the evidence of his friend at trial would breach Article 6(3)(c).

In *Cadder*, Lord Hope had said explicitly that the *Salduz* principle would extend to incriminating evidence obtained from elsewhere as a result of lines of inquiry to which a detainee's answers had given rise.[25] In *P.*, however, the Supreme Court unanimously ruled, in line with the position in Canada and the United States[26], that there was no absolute rule that the use of the fruits of questioning a detainee who had not had access to a lawyer would always be a violation of his rights under Article 6(3)(c). If, for instance, the new evidence existed independently of the answers given in interview, such that the evidence spoke for itself without any need to refer to the interview, its admissibility would depend on whether, in all the circumstances, it was fair to admit it.[27] It was therefore for the trial judge to determine whether the friend's statement should be admitted.[28]

Lord Hope (who again gave the lead judgment) effectively admitted that what he had said in *Cadder* had been ambiguous. [29] Evidence that must inevitably be linked to what the detainee had said, however, would always be inadmissible, and that was what he had had in mind in *Cadder*.[30]

Lord Brown concurred. As he had said in *A. and others v. Secretary of State for the Home Department (No. 2)*, "[g]enerally speaking the court will ... admit in evidence the fruit of the poisoned tree. The balance struck here ('a pragmatic compromise' ...) appears plainly from section 76 of the *Police and Criminal Evidence Act* 1984. There is, moreover, this too to be said: whereas coerced statements may be intrinsically unreliable, the fruits they yield will have independent evidential value."[31]

D. McGowan and *Jude*

The somewhat circular question in *McGowan* was whether the right of access to legal advice during police questioning could be waived if the

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25 *Ambrose* (n.3), [49].

26 See *Murray v. United States*, 487 U.S. 533 (1988) (Supreme Court of the United States), and *Thomson Newspapers Ltd v. Canada (Director of Investigation and Research)* [1990] 1 S.C.R. 425 (Supreme Court of Canada).

27 *P.* (n.24), [27].

28 *ibid.*, [28].

29 *ibid.*, [9].

30 *ibid.*, [16].

31 [2005] UKHL 71, [2006] 2 A.C. 221, [161].

accused had waived it without having received advice from a lawyer as to whether or not he should waive it. In the leading judgment, Lord Hope acknowledged that Article 6 and *Salduz* required that a waiver should be established in an unequivocal manner and attended by the minimum safeguards commensurate with the importance of the right, *viz.* that the accused had been told of his right, that he understood what the right was, and had waived it freely and voluntarily. In *Pishchalnikov v. Russia*[32], the Strasbourg court had also ruled that a waiver must constitute a "knowing and intelligent relinquishment of a right", in that the accused must have been reasonably able to foresee what the consequences of his conduct would be, bringing the position in Europe broadly in line with the position in the United States.[33] Normally, an express waiver would be effective, but account should be taken of the fact that a particular suspect might not appreciate the consequences of his agreeing to be questioned in the absence of a lawyer.[34] Strasbourg jurisprudence did not support the proposition that legal advice was a necessary pre-condition of a valid waiver of access to legal advice.[35] To minimise the risk of misunderstanding where a suspect declines legal advice, Lord Hope advised that the police should, as a matter of best practice[36], point out that the right includes the right to speak to a solicitor on the telephone, ask him and record the reasons why he is declining, and also inform him, even if he has previous experience of the criminal process, of the arrangements that might be made if he wishes to exercise his right but is unable to name a solicitor or is concerned about the cost of employing one.[37] Whether or not there had been a valid waiver on the particular facts of this case, which had not yet gone to trial, would be a matter for the trial court.[38]

Lords Brown, Dyson and Hamilton concurred with Lord Hope, with Lord Brown maintaining that a suspect need understand no more than that that to waive legal advice will result in him being asked questions by the police without the benefit of legal advice,[39]

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32 unreported, September 24, 2009, E.H.R.R.

33 As to which, see, *e.g. Miranda v. Arizona* (n.12), *North Carolina v. Butler*, 441 U.S. 369 (1979) (Supreme Court of the United States), *Oregon v. Elstad*, 470 U.S. 298 (1985) (Supreme Court of the United States) and *Maryland v. Shatzer* ??.

34 *McGowan* (n.31), [46].

35 *ibid.*, [46]-[47].

36 Although in England and Wales, all but the final requirement are obligatory under paragraph 6.5 of Code of Practice C on the detention, treatment and questioning of persons by police officers, which was introuced under the *Police and Criminal Evidence Act* 1984.

37 *ibid.*, [49]-[51], the latter requirement being lifted from an observation in *Miranda v. Arizona* (n.12).

38 *ibid.*, [53].

39 *McGowan* (n.31), [57].

and Lord Dyson stating that where an accused is vulnerable, additional safeguards may be necessary to ensure that he does not waive his right to legal assistance, and that the most obvious way of achieving this is by the provision of legal advice.[40]

Lord Kerr partially dissented. Although he agreed that there was no absolute rule to be deduced from the Strasbourg jurisprudence that a suspect must receive legal advice before he could waive the right,[41] he thought that the prosecution must be able to show that the accused was "aware in a general sense that legal issues might arise and should have consciously decided that he is prepared to forego the advice that a lawyer might give on those issues either before or in the course of the interview.".[42] To Lord Kerr's mind, those steps that Lord Hope had suggested should be taken as a matter of best practice (particularly the taking and recording of reasons for a refusal) should in fact be obligatory, else how could the prosecution effectively show why a suspect had chosen not to consult a solicitor. Simply because a suspect evinced a willingness to answer questions, it should not be presumed that he had tacitly waived his right to access to legal advice.[43]

Jude, delivered on the same day as *McGowan*, was to similar effect, although it related to a vulnerable young adult whose incriminating statement had actually been made unsolicited after an interview for which he had expressly refused legal assistance, and most of Lord Hope's leading judgment therefore related to whether the unsolicited statement could truly be said to be voluntary. He thought that there was clearly room for argument as to whether it would be fair to admit the evidence, but that it was not necessarily incompatible with Article 6(3)(c), and should be re-examined by the High Court of Justiciary in the light of all the facts and circumstances.[44] Lord Kerr again partially dissented. He considered that on the available evidence, and in the absence of any evidence as to the suspect's reasons for refusing legal advice, it had not been shown that there had been an effective waiver.[45]

The court has yet to decide whether legal advice is necessary before a suspect can validly waive his right to legal advice on the question of whether or not he should waive his right to legal advice prior to questioning by the police.

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40 *ibid.*, [67].
41 *ibid.*, [97].
42 *ibid.*, [117].
43 *ibid.*, [127].
44 *Jude* (n.32), [33].
45 *ibid.*, [57].

E. Comment

Although the judgments discussed here all contain important and interlinked questions of law, it is *Salduz*, *Cadder*, *Zaichenko* and *Ambrose* that contain the core principles on the admissibility of evidence obtained from a suspect who has not had access to a lawyer, and it is from these judgments that peripheral issues as to fruits from the poisoned tree (in *P.*) and effective waiver (in *McGowan* and *Jude*) should naturally flow. It is therefore disappointing that looking at these four key judgments together, and considering the quantity of judicial ink spilt on the issue, it cannot be said that a principled or complete approach has yet been reached.

Both *Salduz* and *Cadder* talked of an absolute rule, based on the privilege against self-incrimination, that a suspect must have access to a lawyer prior to interrogation, but of course, in both cases, the courts had only been considering interrogation taking place in custody, and had in all probability not even considered the question of interrogation taking place outside the police station. When directly faced with suspects who had given incriminating statements outside the police station, the majority of the Supreme Court justices in *Ambrose* retreated from the generalised statements that some of them had made in *Cadder*, praying in aid the cases of *Salduz* and *Zaichenko*. Unfortunately, reliance on *Salduz* was problematic, depending as it did on the semantics of a judgment that had not had the point in issue to mind. The excerpt from *Salduz* at the beginning of this casenote is an example of how many of the statements in *Salduz* were as generalised as any of those in *Cadder*. *Zaichenko* also had its difficulties. First, it drew its authority from *Salduz*, but has less authority than *Salduz* because it is not a Grand Chamber decision. Secondly, it explicitly said in the section relating to "General principles" that "[p]ublic-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention …". Thirdly, as noted in the dissenting opinion of Judge Spielmann, the decision that the suspect had not had his freedom of action significantly curtailed was unsatisfactory on the facts of the case. Fourthly, the Strasbourg court's reasoning was, as mentioned by a number of the Supreme Court judges, difficult to follow. In particular, the actual result of the case – that the use of the suspect's admissions at trial had violated his right to a fair trial because, although he had validly waived his right to legal assistance, he had not validly waived the privilege against self-incrimination – appears to beg the question that the court had apparently only just resolved. As Strasbourg decisions go, it is unfortunate that

Zaichenko was the strongest case which the justices in the majority in *Ambrose* could find to support their reasoning.

Ultimately, although they paid lip service to the Strasbourg court, in the absence of a clear position from that court, the majority in *Ambrose* had to reach their own conclusions. This state of affairs was expressly recognised by Lord Dyson.[46] It is plain that the majority's principal reason for drawing the line where they did was that they felt it would be utterly impractical to fetter police to the extent suggested by Lord Kerr. In England and Wales at least, the rights of the suspect were adequately protected by the police duty to caution him before questioning him once he became a suspect and arresting him once there were reasonable grounds for believing that he had committed an offence. The privilege against self-incrimination was not absolute, and, on balance, it was acceptable that the right to a lawyer should only become absolute once a suspect was in custody (or his freedom of action otherwise significantly curtailed) because of the greater need for protection at that point.

While this result is absolutely defensible, the reasoning behind it is not. The problem is that a reading of the various judgments in *Ambrose*, and a comparison of those judgments with the judgments in *Salduz*, *Cadder* and *Zaichenko*, gives a conflicting understanding of the relationships and hierarchies between the various and competing principles and rights, and leaves a number of fundamental questions either unanswered or unclear. For example, are the right to silence and the privilege against self-incrimination two different rights, or is the former merely a subsidiary of the latter? If they are two different rights, which of those rights gives rise to the right to access to a lawyer, or is the right to legal advice, as suggested in *McGowan* by Lord Kerr and Lord Hamilton, itself an autonomous right which has some independent value? If it is an autonomous right, then a radical re-think of what its underlying purpose is, what it entails and when it becomes absolute is what is required, without complicating the issues with unnecessary references to the privilege against self-incrimination or the right to silence. If, on the other hand, the right to legal advice is merely a subsidiary of the privilege against self-incrimination or the right to silence, then surely what matters is (as hinted at by Lords Hope and Brown in *Ambrose*) not the moment that a suspect is given access to a lawyer (because a suspect can always refuse to answer police questions) but at what point he should be reminded of his right to a lawyer, at what point he should be provided with a lawyer if he cannot afford his own, and what the consequences of a failure to answer questions will be if for whatever reason access to a lawyer is denied? In England and Wales, the failure of a suspect to answer

[46] *Ambrose* (n.3), [104].

questions after caution, but before arrest, may in certain circumstances give rise to adverse inferences at trial.[47] If he has not been given access to a lawyer and yet has adverse inferences made against him at trial, how can any of the aforementioned rights adequately be protected? How exactly does the right to a fair trial under Article 6 fit in with all this? Does it only apply in relation to arguments as to admissibility (which in England are adequately dealt with by the exclusionary rule in section 78 of the *Police and Criminal Evidence Act* 1984) or should it protect the suspect whose case never reaches trial but who nonetheless wants to make a claim against the authorities for their refusal to give him access to a lawyer? Do the answers to any of these questions change if one reads "the right to access to legal advice" as referring instead to "the right to access to free legal advice"?

F. Conclusion

It is a fair bet that the United Kingdom Supreme Court has not seen the last of Scotland and that the European Court has not had its last word on the right of access to lawyers. Indeed, at the time of writing, a similar question to that in *Ambrose* is before the Strasbourg court in an application by Ismail Abdurahman.[48] Abdurahman made an incriminating statement at a police station, after he had been cautioned, but before he had been arrested and while he was still free to go. As noted by Lord Hope, however, the case is still awaiting a hearing, and the judgment cannot therefore be taken to be imminent.[49]

To untie this tangle the issue needs to be addressed from first principles. It is to be hoped that one or other of our eminent courts will have the courage to do so, and that soon we will be able to call one judgment definitive.

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47 *Criminal Justice and Public Order Act* 1994, s.34(5)(a).

48 App. No. 40351/09.

49 *Ambrose* (n.3), [49].

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